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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 09-2276

UTE MOUNTAIN UTE TRIBE, PLAINTIFF-APPELLEE,

v.

DOROTHY RODRIGUEZ, SECRETARY, TAXATION AND REVENUE DEPARTMENT FOR THE STATE OF NEW MEXICO, DEFENDANT-APPELLANT.

[Argued and Submitted Sept. 20, 2010
Filed: July 27, 2011]

OPINION

Before: BRISCOE, Chief Judge, LUCERO, and HOLMES, Circuit Judges.

Dissent by Judge LUCERO.

HOLMES, Circuit Judge:

INTRODUCTION

In this case, we must resolve the issue of whether federal law preempts five state taxes imposed on non-Indian lessees extracting oil and gas from the Ute Mountain Ute Reservation ("Ute Reservation") in New Mexico. The district court, finding in favor of Plaintiff–Appellee Ute Mountain Ute Tribe ("Ute Tribe" or "Tribe"), held that the five state taxes were preempted by federal law and enjoined the State of New Mexico from further imposing the taxes on the non-Indian lessees operating on the Ute Reservation. The Secretary of the New Mexico Taxation and Revenue Department, Dorothy Rodriguez ("the State"), now appeals from that adverse judgment.[1]

On appeal, the State argues, *inter alia,* that the district court misinterpreted and misapplied Supreme Court precedent. Specifically, the State asserts that the five New Mexico state taxes are valid and enforceable under the Supreme Court case *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989), and therefore asks this court to reverse the district court's judgment and vacate the injunction. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reverse the district court's judgment and remand the case for further proceedings not inconsistent with this opinion.

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[1] At the outset of this litigation, Rick Homans was the Secretary of the New Mexico Taxation and Revenue Department. The State's counsel informed us on September 3, 2010, that Mr. Homans no longer holds this position. His replacement is Dorothy Rodriguez. Therefore, pursuant to Federal Rule of Appellate Procedure 43(c)(2), we order the substitution of Ms. Rodriguez in the place of Mr. Homans.

BACKGROUND[2]

The Ute Tribe is a federally recognized Indian Tribe with approximately 2000 enrolled members. The Ute Reservation—which is located in the States of New Mexico, Utah, and Colorado—was first established by treaty in 1868.[3] The initial Ute Reservation was reduced in size by two subsequent acts of Congress.[4] The Reservation is therefore both a treaty and a statutory reservation, rather than an executive reservation established by executive order. The federal government holds the Reservation in trust for the benefit of the Ute Tribe. The majority of the Ute Reservation lies within the State of Colorado; only a small portion lies within New Mexico's borders. The portion of the Reservation located in New Mexico is unallotted and uninhabited, and the only activities that occur on that portion of the Reservation are grazing and the extraction of mineral resources.[5] Although there are some unpaved roads

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[2] This background section is largely drawn from the 311 factual findings set out in the district court's October 2, 2009 Memorandum Opinion. On appeal, the parties do not specifically contest any of the district court's factual findings; rather, they dispute the legal conclusions that should be drawn from those facts.

[3] *See* Treaty Between the United States of America and the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Ute Indians, 15 Stat. 619 (Mar. 2, 1868).

[4] *See* Act of Apr. 29, 1874, ch. 136, 18 Stat. 37; Act of June 15, 1880, ch. 223, 21 Stat. 199.

[5] Subsequent references to the "Ute Reservation" or "Reservation" refer solely to the portion of the tribal lands located in New Mexico

on the Tribe's land, there are no state-regulated or state-maintained roads or other infrastructure within the Reservation.

The Ute Tribe is authorized by federal law, subject to approval by the Secretary of the Interior, to enter into oil and gas leases and development agreements on the Reservation.[6] The Tribe began entering into mineral leases with oil and gas operators on the Reservation in the 1950s. Authority to execute mineral leases is granted by the Indian Mineral Leasing Act of 1938 ("IMLA"), ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a–396g).[7] Authority to execute mineral development agreements is authorized by the Indian Mineral Development Act of 1982 ("IMDA"), Pub.L. No. 97–382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101–08).[8]

There are 186 active oil and gas wells on the Ute Reservation, which are operated under existing leases and agreements by twelve different oil and gas

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[6] The Secretary has delegated the authority to approve leases and agreements to the Bureau of Indian Affairs ("BIA").

[7] The IMLA has been implemented through comprehensive regulations promulgated by the Secretary of the Interior. *See, e.g.,* 25 C.F.R. pt. 211 (regulating the "[l]easing of [t]ribal [l]ands for [m]ineral [d]evelopment"); 30 C.F.R. pt. 202 (regulating mineral resource royalties); 43 C.F.R. pt. 3160 (regulating "[o]nshore [o]il and [g]as [o]perations").

[8] The IMDA has likewise been implemented through comprehensive regulations promulgated by the Secretary of the Interior. *See, e.g.,* 25 C.F.R. pt. 225 (regulating "[o]il and [g]as, [g]eothermal, and [s]olid [m]inerals [a]greements" on Indian land); 30 C.F.R. pt. 202 (regulating mineral resource royalties); 43 C.F.R. pt. 3160 (regulating "[o]nshore [o]il and [g]as [o]perations").

companies. Natural gas is the primary resource extracted from the wells, with oil being the secondary resource. Most, if not all, of the existing leases between the Ute Tribe and the twelve lessees were executed under the IMLA. In fact, the district court identified no leases, and only three development agreements, executed under the IMDA.[9] The mineral resources severed from the Ute Reservation are extracted from several oil and gas pools located beneath the Reservation. These oil and gas pools were established in the 1940s and 1950s by the Oil and Conservation Division of the New Mexico Energy, Minerals, and Natural Resources Department ("NMOCD"), which is the state entity responsible for the regulation of oil and gas operations in New Mexico. Apart from defining and establishing the oil and gas pools, NMOCD also sets well spacing and well setbacks in the State, among a wide variety of other functions.

The federal statutory and regulatory scheme governing oil and gas operations on Indian land covers virtually every aspect of such operations on the Ute Reservation. *See* 25 C.F.R. pt. 211 (governing "[l]easing of [t]ribal [l]ands for [m]ineral [d]evelopment"); 25 C.F.R. pt. 224 (governing "[t]ribal [e]nergy [r]esource [a]greements"); 25 C.F.R. pt. 225 (governing "mineral agreements for the development of Indian-owned minerals entered into pursuant to the [IMDA]"); 30 C.F.R. §§ 1202.550–.558 (governing royalties on gas production from Indian leases); 30 C.F.R. §§ 1206.50–.62 (governing product valuation

[9] Those development agreements are between the Ute Tribe and Elk San Juan, Inc., BIYA Operators, Inc., and Texakoma Oil and Gas Corp

for mineral resources produced from Indian oil and gas leases); 43 C.F.R. pt. 3160 (governing onshore oil and gas operations, which are overseen by the Bureau of Land Management ("BLM")).[10]

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[10] The district court described the federal regulatory scheme in the following manner:

> For unallotted lands, such as the [Ute] Reservation, the [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.

R. at 228–29 (third, fourth, and fifth alterations in original) (Dist. Ct. Op., dated Oct. 2, 2009). We do not disagree with this characterization

However, the role of NMOCD is not entirely nonexistent when it comes to oil and gas operations on the Ute Reservation. The federal government and NMOCD have a cooperative regulatory relationship when it comes to at least setting well spacing and well setbacks on the Reservation. More specifically, as the district court noted in its opinion, "the BLM adopted the NMOCD standards for well spacing and setbacks as the standards for Indian lands," including the Ute Reservation, and "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." R. at 193. After the NMOCD conducted a hearing regarding one of the aforementioned categories (e.g., setting of well spacing or approval of a non-standard well location), NMOCD would issue a draft order that the BLM would generally adopt as a final order. NMOCD also established the oil and gas pools underlying the Ute Reservation from which the mineral resources are severed. Furthermore, apart from the cooperative regulatory relationship regarding well spacing and setbacks, and the establishment of the oil and gas pools, NMOCD is otherwise involved—although minimally—with the operations that take place on the Ute Reservation. *See, e.g., id.* at 180–81 (explaining that NMOCD requires operators on the Ute Reservation to file certain forms and may revoke the operators' authority to transport resources in the State if such requirements are not met).

Once the oil and gas is severed from the tribal land, the mineral resources are transported off the

reservation to be processed and sold, which is only made possible through the use of an off-reservation infrastructure. Oil extracted from the Ute Reservation is transported by truck to refineries in New Mexico, outside of the Reservation, "on roads ... [that] are constructed and maintained by the State of New Mexico." *Id.* at 200. Natural gas extracted from the Reservation is transported to processing facilities within the State "through gathering pipelines in the [Reservation] to main lines in New Mexico." *Id.* at 184, 201. The off-reservation infrastructure used to transport the extracted resources is regulated—and in the case of roads, provided and maintained—by the State of New Mexico. *See, e.g.,* Pipeline Safety Act, N.M. Stat. Ann. §§ 70–3–1 to –22; Gathering Line Land Acquisition Act, N.M. Stat. Ann. §§ 70–3A–1 to 70–3A–7. "Without an off-reservation infrastructure in New Mexico to transport oil and gas," which is only made possible by the State, "the economic value of the oil and gas produced on the [Ute Reservation] would be substantially less." R. at 201. The district court consequently found that "[t]he State provides substantial services by regulating the off-reservation infrastructure that makes transport of oil and gas possible." *Id.*

The State also makes available to the non-Indian oil and gas operators some on-reservation services, including "a hearing process for resolving disputes between operators, publicly available geologic records, publicly available production records, and records of sales and transfers," all of which the trial court found were rarely, if ever, utilized by the operators. *Id.* at 199–200. In addition, NMOCD offers to provide "environmental cleanup and site inspection" and the "plugging of abandoned wells" on

the Reservation, but these services are likewise not used by the Tribe or operators. *Id.* at 181, 199. The non-use of these services is largely due to the fact that the Tribe "has barred NMOCD officials and employees from entering the [Reservation] without permission" since 1992, "because the [Tribe] does not recognize the authority of NMOCD over oil and gas on the [Reservation]." *Id.* at 194.[11]

The Ute Tribe generates revenue from the oil and gas operations on the Reservation through royalties and taxes. The Tribe "receives 13.1% of the wellhead value [of the oil or gas] in royalties," which are "distributed to enrolled members of the [Tribe] on a per-capita basis." *Id.* at 201. In 2007, the Tribe received almost $4.5 million in royalties. The Tribe also imposes two taxes on non-Indian operators extracting resources from the Reservation: (1) a possessory interest tax, which is "assessed at the rate of 6% of the market value of the lease or agreement," and (2) a severance tax, which is "assessed at the rate of 5% of the wellhead value of the oil or gas severed on the [Reservation] and sold or transported off the Reservation." *Id.* at 202. The net effect of the two taxes "has been, on average, a 9.5% tax on the gross wellhead value of oil and gas extracted on the [Reservation]." *Id.*

In addition to the tribal taxes, the State of New Mexico imposes five taxes on oil and gas operators working in the State, including operators extracting resources from the Ute Reservation. These five taxes

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[11] NMOCD has abided by this policy, but there is no evidence suggesting that it agrees with the Tribe on this issue. The Tribe has, however, permitted NMOCD to enter the Reservation on a few occasions since 1992

are the Oil and Gas Severance Tax, N.M. Stat. Ann. § 7–29–1; the Oil and Gas Conservation Tax, *id.* § 7–30–1; the Oil and Gas Emergency School Tax, id. § 7–31–1; the Oil and Gas Ad Valorem Production Tax, *id.* § 7–32–1; and the Oil and Gas Production Equipment Ad Valorem Tax, *id.* § 7–34–1. These are the five taxes that the Tribe challenges in the case at bar. As the district court found, the existing leases and agreements between the oil and gas operators and the Ute Tribe "do not directly pass the cost of the five New Mexico taxes on to the [Tribe]"; the oil and gas operators pay the taxes. *Id.* at 203.[12]

In 1992, the Ute Tribe passed Resolution No. 3874, which dictates that "in the event the five New Mexico taxes are found unlawful, the [Tribe's] severance tax will be increased by the amount of the five New Mexico taxes." *Id.* at 203; *see also* Ute

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[12] To alleviate the economic burden of these taxes, the State offers two tax credits to operators subject to the five state taxes: the Intergovernmental Production Tax Credit and the Intergovernmental Production Equipment Tax Credit, which only apply to wells drilled after July 1, 1995. *See* N.M. Stat. Ann. § 7–29C–1. "The net effect of the New Mexico tax credits has been an average reduction (over 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 [Reservation]"; however, "the reduction is increasing as new wells come into production and old wells are shut down." R. at 198. In the event that the Tribe decides to increase tribal taxation on operators extracting resources from the Reservation, the Intergovernmental Production Tax Credit (but not the Intergovernmental Production Equipment Tax Credit) offered by the State will be reduced by the amount of the tribal tax increase on wells drilled on or after July 1, 1995. *See* N.M. Stat. Ann. § 7–29C–1(F).

Mountain Ute Tribal Council Resolution No. 3874 (Feb. 13, 1992). The money collected from this increased severance tax would go to the Tribe and its members. Specifically, the district court found that if the state taxes were removed and the Resolution was implemented, the Tribe "would receive at least $1,300,000 per year in additional revenue from the severance tax, an increase of approximately $650 per enrolled [tribal] member per year." *Id.* at 204. The district court also found that if the taxes were found unlawful, but the Resolution was rescinded or otherwise not implemented, then "oil and gas production on the [Ute Reservation] would become more attractive to oil and gas operators relative to oil and gas production elsewhere in New Mexico," which would in turn lead to increased production and increased revenues for the Tribe. *Id.* at 205. However, regardless of whether the five state taxes are enforced and regardless of whether the Resolution is ever implemented, the Ute Tribe nevertheless "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." *Id.* at 203 (citing *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982)).[13]

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[13] Of course, if an existing lease or agreement prohibited an increase in taxes, or placed a cap on the percentage of revenues, that general authority to increase existing taxes or enact a third tax would be limited. "The only leases or agreements under which the [Ute Tribe] has surrendered—at least to an extent—its authority to increase severance taxes are the recent [development] agreements that cap [tribal] revenues at 30%." *Id.* at 203. However, the "revenues in those agreements are currently substantially below 30% and an increase of [tribal] revenue to 30% would be significant." *Id.* at 204. In other words, those caps do not present a real impediment to the Tribe's

Furthermore, the district court found—and the parties do not dispute—that "[t]here is no record evidence that the imposition of the five New Mexico taxes substantially interferes with the [Tribe's] ability to govern itself." *Id.* at 206.

On August 10, 2007, the Tribe filed a complaint in district court challenging the five New Mexico taxes. The Tribe asserted that: (1) "the imposition of the state taxes violates federal common law, the federal right of the [Tribe] to self-determination, and the Supremacy Clause"; and (2) the imposition of 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 the State "disclaimed any taxing jurisdiction over lands held by the United States of America for the benefit of tribes." *Id.* at 173.[14] After trial, in a memorandum opinion, the district court held that the five New Mexico taxes were preempted by federal law. The district court based this holding on several conclusions, including that "there is a significant

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ability to raise taxes under those agreements. In any event, the district court only identified a total of three development agreements that the Tribe had entered into, only one of which included a 30% cap. Furthermore, the "revenue from development agreements, including those agreements which cap [tribal] revenue at 30%, is not a substantial part of [the Tribe's] revenue from oil and gas development"; "[t]he much greater part of [the Tribe's] revenue comes from leases without any cap on [tribal] revenues." *Id.* at 204.

[14] The Ute Tribe brought a third challenge under 42 U.S.C. § 1983, which was dismissed by the district court, along with a related request for costs and attorneys' fees. Those rulings are not before us.

backdrop of tribal sovereignty" in this case; that the State has "minimal" involvement in the oil and gas operations on the Reservation; that "the economic burden falls heavily on the Tribe," rather than the non-Indian lessees; and that the State of New Mexico did not "regulate[ ] oil and gas operations on the [Reservation]." *Id.* at 234. The district court subsequently entered judgment in favor of the Ute Tribe "(1) declaring that [the State had] been acting in violation of federal laws by the imposition of the[ ] [five] taxes, and (2) permanently enjoining [the State] from henceforth imposing the five state taxes at issue in this case." *Id.* at 235 (Trial Ct. J., dated Oct. 30, 2009). The State timely appealed the district court's judgment.

DISCUSSION

The Ute Tribe challenges the five New Mexico taxes at issue on the grounds that they are preempted by federal law and that they interfere with the Tribe's right of self-governance. The same five New Mexico taxes at issue in this appeal were also challenged in *Cotton Petroleum,* where the taxes were upheld. In that case, the Supreme Court applied a flexible preemption analysis unique to federal Indian law, which was first articulated in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), and further established in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982). The district court applied the same preemption analysis in the present case. On appeal, the State argues that the district court misinterpreted and misapplied the applicable Supreme Court case law, and that the outcome of this case is controlled by *Cotton Petroleum*—that is, the

State argues that this case cannot be materially distinguished from *Cotton Petroleum* and therefore the taxes should be deemed lawful and enforceable, just as they were in that case. Applying the "flexible preemption analysis" developed by the Supreme Court in *Bracker, Ramah*, and *Cotton Petroleum,* we must resolve whether the five New Mexico taxes at issue are preempted by federal law.

I. Standard of Review

On appeal, "[w]e review the district court's preemption determination de novo." *Ramsey Winch Inc. v. Henry,* 555 F.3d 1199, 1204 (10th Cir.2009). We review the district court's underlying factual findings for "clear error." *Green v. Haskell Cnty. Bd. of Comm'rs,* 568 F.3d 784, 795 (10th Cir.2009), *cert. denied,* —— U.S. ——, 130 S.Ct. 1687, 176 L.Ed.2d 180 (2010). Clear error exists "only if a finding is wholly without factual support in the record, or after reviewing the evidence, we are definitively and firmly convinced that a mistake has been made." *United States v. Ivory,* 532 F.3d 1095, 1103 (10th Cir.2008) (quoting *United States v. Rodriguez–Felix,* 450 F.3d 1117, 1130 (10th Cir.2006)) (internal quotation marks omitted). However, neither party challenges the district court's specific factual findings on appeal. *See supra* note 2.

II. Federal Indian-law Preemption Doctrine

"[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *Bracker,* 448 U.S. at 142, 100 S.Ct. 2578. The Supreme Court has identified "two independent but related barriers to the assertion of state

regulatory authority over tribal reservations and members"—preemption by federal law and tribal sovereignty. *Id.; see also Ramah,* 458 U.S. at 837, 102 S.Ct. 3394. As the Supreme Court explained in *Ramah:*

> The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important back-drop, ... against which vague or ambiguous federal enactments must always be measured.

458 U.S. at 837, 102 S.Ct. 3394 (quoting *Bracker,* 448 U.S. at 143, 100 S.Ct. 2578) (internal quotation marks omitted). Therefore, "[a]lthough determining whether federal legislation has pre-empted state taxation of lessees of Indian land is primarily an exercise in examining congressional intent, the history of tribal sovereignty serves as a necessary 'backdrop' to that process." *Cotton Petroleum,* 490 U.S. at 176, 109 S.Ct. 1698 (citing *Rice v. Rehner,* 463 U.S. 713, 719, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983)).

In this particular context, Supreme Court jurisprudence regarding "whether a State may tax on-reservation oil production by non-Indian lessees has varied over the course of the past century." *Cotton Petroleum,* 490 U.S. at 173, 109 S.Ct. 1698.

"At one time, such a tax was held invalid unless expressly authorized by Congress; more recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress." *Id.* Under the current doctrine, when determining whether a state has authority to impose a nondiscriminatory tax on non-Indian lessees operating on Indian lands, the court must undertake a preemption analysis that is unique to this area of the law. *See, e.g., Ramah,* 458 U.S. at 838, 102 S.Ct. 3394 (stating that "[t]he question [of] whether federal law ... pre-empts the State's exercise of its regulatory authority [in this area] is not controlled by standards of pre-emption developed in other areas" (citing *Bracker,* 448 U.S. at 143–44, 100 S.Ct. 2578)). This analysis is "not controlled by 'mechanical or absolute conceptions of state or tribal sovereignty.' " *Cotton Petroleum,* 490 U.S. at 176, 109 S.Ct. 1698 (quoting *Bracker,* 448 U.S. at 145, 100 S.Ct. 2578). Instead, courts are instructed to "appl[y] a flexible pre-emption analysis sensitive to the particular facts and legislation involved." *Id.* This fact-specific examination requires a reviewing court to undertake a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," which is "designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker,* 448 U.S. at 145, 100 S.Ct. 2578. Moreover, as alluded to above, when making this inquiry the court must be "cognizant of both the broad policies that underlie the legislation and the history of tribal independence in the field at issue." *Cotton Petroleum,* 490 U.S. at 176, 109 S.Ct. 1698; *see also Ramah,* 458 U.S. at 838, 102 S.Ct. 3394 ("[T]he traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional

Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry."). Under this balancing test, "[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (citing *Bracker,* 448 U.S. at 145, 100 S.Ct. 2578; *Ramah,* 458 U.S. at 846, 102 S.Ct. 3394).

The "particularized inquiry" we are instructed to employ is better understood as it has been applied by the Supreme Court in *Bracker, Ramah*, and *Cotton Petroleum.* At the outset, it is important to point out the three primary factors the Supreme Court has focused on when applying this flexible preemption analysis: (1) the extent of the federal and tribal regulations governing the taxed activity; (2) whether the "economic burden" of the tax falls on the tribe or the non-Indian individual or entity; and (3) the extent of the state interest justifying the imposition of the taxes.[15]

In *Bracker,* the Supreme Court addressed a challenge to Arizona's motor carrier license and use fuel taxes as applied to a non-Indian logging company's use of roads located solely on tribal land. 448 U.S. at 139–40, 100 S.Ct. 2578. The Court assessed the "state, federal, and tribal interests at stake," and concluded that the Arizona state taxes

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[15] The district court in this case correctly identified these three factors as the ones uniformly analyzed by the Supreme Court in *Bracker, Ramah*, and *Cotton Petroleum.*

were preempted by federal law. *Id.* at 145–51, 100 S.Ct. 2578. In evaluating the federal interest, the Court found "that the federal regulatory scheme [was] so pervasive as to preclude the additional burdens sought to be imposed in th[at] case." *Id.* at 148, 100 S.Ct. 2578. It found that the "assessment of [the] state taxes would obstruct federal policies," including the federal objective "that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber." *Id.* at 148–49, 100 S.Ct. 2578. As to the state interest involved, the Court deemed it "equally important" that the respondents were "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation." *Id.* at 148–49, 100 S.Ct. 2578. That is, the Court was not "able to identify a legitimate regulatory interest served by the taxes" other than "a general desire to raise revenue." *Id.* at 150, 100 S.Ct. 2578. Furthermore, because the "Tribe agreed to reimburse [the company] for any tax liability incurred as a result of its on-reservation business activities," including the Arizona taxes at issue, it was "undisputed that the economic burden of the asserted taxes [would] ultimately fall on the Tribe." *Id.* at 140, 151, 100 S.Ct. 2578; *see also id.* at 150, 100 S.Ct. 2578 (stating that "this is not a case in which the State seeks to assess taxes in return for governmental functions it performs *for those on whom the taxes fall*" (emphasis added)).[16] In light of

[16] The Court noted, however, that "the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted." *Bracker,* 448 U.S. at 151 n. 15, 100 S.Ct. 2578 (citing *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976)).

the "pervasive" federal scheme of regulation, the unquestionable incidence of the economic burden on the tribe, and the lack of any identified regulatory function or service performed by the state, the Court concluded that the Arizona taxes were preempted by federal law. *See id.* at 151, 100 S.Ct. 2578 ("Where, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.").

In *Ramah,* the State of New Mexico sought to impose a tax on two non-Indian construction companies hired by the tribe to build a school on the reservation. In reviewing a challenge to the tax, the Court "address[ed] the question [of] whether federal law pre-empts a state tax imposed on the gross receipts that a non-Indian construction company receives from a tribal school board for the construction of a school for Indian children on the reservation." *Ramah,* 458 U.S. at 834, 102 S.Ct. 3394. In that case, although the construction company initially paid the state tax, the company "was reimbursed by the [tribe] for the full amount paid"; therefore, as in *Bracker,* the economic burden of the tax fell on the tribe. *Id.* at 835, 102 S.Ct. 3394; *see also Cotton Petroleum,* 490 U.S. at 184, 109 S.Ct. 1698 ("Also as in *Bracker,* the economic burden of the tax [challenged in *Ramah*] ultimately fell on the Tribe.").

Looking to the federal interest—that is, the extent of the federal scheme—the Court observed that the "[f]ederal regulation of the construction and financing of Indian educational facilities [was] both comprehensive and pervasive," *Ramah,* 458 U.S. at 839, 102 S.Ct. 3394, which "left the State with no duties or responsibilities" when it came to the education of Indian children, *id.* at 843, 102 S.Ct. 3394 (quoting *Warren Trading Post Co. v. Ariz. Tax Comm'n,* 380 U.S. 685, 691, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965)) (internal quotation marks omitted). The existence of this "comprehensive and pervasive" federal scheme, and corresponding lack of any identified state role, left "no room for the additional burden sought to be imposed by the State through its taxation of the gross receipts." *Id.* at 842, 102 S.Ct. 3394. The state was otherwise unable to identify "any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax." *Id.* at 843, 102 S.Ct. 3394. The state argued that the services provided to the company for its activities off the reservation were significant enough to justify the tax, but the Court rejected this argument:

> The only arguably specific interest advanced by the State is that it provides services to *Lembke* [the non-Indian construction company] for its activities *off the reservation.* This interest, however, is not a legitimate justification for a tax whose ultimate burden falls on the tribal organization. Furthermore, although the State may confer substantial benefits on Lembke as a state contractor, we fail to see how these benefits can justify a tax imposed on the construction of school facilities *on tribal lands* pursuant to a contract between

> the tribal organization and the non-Indian contracting firm.

Id. at 843–44, 102 S.Ct. 3394 (footnote omitted).[17] In the end, "[t]he State's ultimate justification ... amount[ed] to nothing more than a general desire to increase revenues," which the Court found—as it did in *Bracker*—was "insufficient to justify the additional burdens imposed by the tax on 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, 102 S.Ct. 3394. Having considered each of these factors, the Court concluded that the case was analogous to *Bracker,* and therefore that the state tax was preempted by federal law. *Id.* at 839, 102 S.Ct. 3394.

In *Cotton Petroleum,* which is most important for our purposes, the Court considered a challenge to the same five taxes at issue in the present appeal, brought by a non-Indian lessee conducting oil and gas operations on the Jicarilla Apache Reservation in New Mexico, which was an *executive* reservation.[18][FN18] Applying the analytical principles articulated in *Bracker,* and further developed in *Ramah,* the Court concluded that the five New Mexico taxes were not preempted by federal law. In

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[17] The Court presumed that "the state tax revenues derived from [the contractor's] off-reservation business activities [would be] adequate to reimburse the State for the services it provide[d] to [the contractor]." *Ramah,* 458 U.S. at 844 n. 9, 102 S.Ct. 3394.

[18] Although the Indian tribe was not a party to the suit, it sought and was granted leave to file a brief *amicus curiae. Cotton Petroleum,* 490 U.S. at 170, 109 S.Ct. 1698.

reaching this conclusion, the Court first looked to the relevant federal legislation—the IMLA—and found that the Act "neither expressly permits state taxation nor expressly precludes it." *Cotton Petroleum,* 490 U.S. at 177, 109 S.Ct. 1698. The Court "agree[d] that a purpose of the [IMLA] is to provide Indian tribes with badly needed revenue, but f[ound] no evidence for the further supposition that Congress intended to remove all barriers to profit maximization" through the Act. *Id.* at 180, 109 S.Ct. 1698; *see also id.* at 180–83, 109 S.Ct. 1698 (rejecting *Cotton Petroleum*'s argument that the IMLA impliedly prohibited state taxation of oil and gas operations on Indian land by non-Indians, and stating that the Act was "fully consistent with an intent to permit state taxation of nonmember lessees").

Next, the Court examined the history of tribal independence in the area of oil and gas leasing on Indian land. *Id.* at 181–82, 109 S.Ct. 1698. "[A]t least as to Executive Order reservations," it concluded, "state taxation of nonmember oil and gas lessees was the norm from the very start," and therefore there was "no history of tribal independence from state taxation of the lessees to form a 'backdrop' against which the [IMLA] must be read." *Id.* at 182, 109 S.Ct. 1698.[19]

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[19] Oil and gas leasing on *executive* reservations, such as the Jicarilla Apache Reservation, was first authorized by the Indian Oil Act of 1927 ("1927 Act"), ch. 299, 44 Stat. 1347 (codified at 25 U.S.C. § 398a), which also waived immunity from state taxation of oil and gas lessees operating on those reservations. Because Congress had simultaneously authorized oil and gas leases on executive reservations and waived immunity from taxation of oil and gas lessees operating on such reservations, the Supreme Court found that there was no history of tribal

The Court then analyzed the state, federal, and tribal interests at stake, focusing on the same factors that had been highlighted in *Bracker* and *Ramah*—the extent of the federal regulatory scheme, the economic burden, and the services and functions of the State justifying the taxes.[20] In considering the federal regulatory scheme, the Court concluded that the regulations were "extensive," but "not exclusive," as were the regulations in *Bracker* and *Ramah,* because the "State regulate[d] the spacing and mechanical integrity of the wells located on the reservation." *Id.* at 186, 109 S.Ct. 1698.[21] As to the State's interest, the Court found that the State had a valid interest in imposing the tax because it

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independence in that instance. *Cotton,* 490 U.S. at 182, 109 S.Ct. 1698. However, because the Ute Reservation is a treaty and statutory reservation, the Court's conclusion that there was "no history of tribal independence from state taxation of the lessees [on executive reservations]," *id.,* is not controlling here.

[20] The *Cotton Petroleum* Court based its analysis largely on the factual findings made by the state district court, which had upheld the taxes. *See id.* at 185, 109 S.Ct. 1698 (stating that "[t]he factual findings of the [district court] clearly distinguish this case from both [*Bracker* and *Ramah*]").

[21] Although the majority does not elaborate on the extent of New Mexico's regulation of well spacing and mechanical integrity, Justice Blackmun does so in the dissent. He states that "[t]he manner in which a State exercises a regulatory role in the area of well spacing indeed underscores the comprehensiveness of *federal* law in this area: state law applies not of its own force, but only if its application is approved by the [BLM]. Furthermore, additional federal spacing requirements apply to Indian lands." *Id.* at 206 n. 9, 109 S.Ct. 1698 (Blackmun, J., dissenting) (citing 43 C.F.R. § 3162.3–1(a) and (b) (1987)).

"provide[d] substantial services to both the Jicarilla Tribe and Cotton," at a rate of approximately $3 million dollars per year. *Id.* at 185, 109 S.Ct. 1698. The Court distinguished the case from *Bracker* and *Ramah,* which "involved complete abdication or noninvolvement of the State in on-reservation activity." *Id.* Lastly, as to the economic burden, the court acknowledged that "[n]o economic burden [fell] on the tribe by virtue of the state taxes," because the five taxes were paid by Cotton Petroleum and were not passed on to the tribe. *Id.* at 168, 185, 109 S.Ct. 1698 (first alteration in original) (internal quotation marks omitted). Furthermore, "the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development." *Id.* at 185, 109 S.Ct. 1698. Accordingly, because of the stated differences between that case and *Bracker* and *Ramah,* the Court held that the five New Mexico taxes at issue here were not preempted by federal law. *Id.* at 186, 109 S.Ct. 1698.

III. Preemption Analysis

We agree with the district court, and the parties, that the preemption analysis applied by the Supreme Court in *Bracker, Ramah*, and *Cotton Petroleum* governs the outcome of this case. Furthermore, we note that the district court correctly "follow[ed] the sequence taken by the United States Supreme Court in *Cotton Petroleum,*" looking first to the relevant legislation (i.e., the IMLA and IMDA), then considering the "historical backdrop" of relevant tribal sovereignty in the area of oil and gas leasing on Indian land, and lastly carrying out what the district court termed "*Bracker* balancing," by examining the relevant state, federal, and tribal interests and "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." R. at 224–25. Our analysis follows this same sequence.

A. Relevant Legislation: IMLA and IMDA

In the present case, the leases and agreements entered into by the Ute Tribe were executed under the IMLA and IMDA. In *Cotton Petroleum,* the Supreme Court evaluated the IMLA under standard principles of statutory interpretation and determined that the IMLA "neither expressly permits state taxation nor expressly precludes it." 490 U.S. at 177, 109 S.Ct. 1698; *see Montana v. Crow Tribe of Indians,* 523 U.S. 696, 714, 118 S.Ct. 1650, 140 L.Ed.2d 898 (1998) (stating that "*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"); *see also* R. at 218–19 ("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 [in *Cotton Petroleum*] inferred that Congress would have understood Tribal leases to be equally subject to state taxation."). The same conclusion applies in this case—the IMLA, which governs almost all of the leases and agreements between the Ute Tribe and the oil and gas operators, does not expressly permit or expressly authorize taxation.[22]

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[22] In *Cotton Petroleum,* the Supreme Court also looked at several other federal statutes in pointing out the absence of any congressional intent to preempt state taxation, stating:

The other relevant statute at issue in this case is the IMDA. The IMDA "was enacted to provide Indian tribes with flexibility in the development and sale of mineral resources," *Quantum Exploration, Inc. v. Clark,* 780 F.2d 1457, 1458 (9th Cir.1986), by authorizing tribes to enter into "mineral agreements"

> Nor can a congressional intent to pre-empt state taxation be found in the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461 *et seq.,* the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.,* or the Indian Self–Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 et seq. Although these statutes "evidence to varying degrees a congressional concern with fostering tribal self-government and economic development," *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 155, 100 S.Ct. 2069, 2082, 65 L.Ed.2d 10 (1980), they no more express a congressional intent to pre-empt state taxation of oil and gas lessees than does the 1938 Act. More instructive is the Crude Oil Windfall Profit Tax Act of 1980, 94 Stat. 229, 26 U.S.C. § 4986 *et seq.* In imposing the windfall profits tax, Congress expressly exempted certain Indian producers, *see* 26 U.S.C. § 4994(d), but decided not to exempt "oil received by non-Indian lessees of tribal interests." *See* S.Rep. No. 96–394, p. 61 (1979). *See also* H.R. Conf. Rep. No. 96–817, p. 108 (1980), U.S.Code Cong. & Admin. News 1980, pp. 410, 471. 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 those lessees.

Cotton Petroleum, 490 U.S. at 183 n. 14, 109 S.Ct. 1698. Although not the focus of our analysis here, we see no reason why the Supreme Court's analysis of these other federal acts would not apply with equal force in this case.

with developers, such as joint-venture and product-sharing agreements. *See* 25 U.S.C. § 2102(a). The district court concluded that the IMDA exhibited "no Congressional intent to prohibit—or to allow—state taxation," just as the Supreme Court found with the IMLA. R. at 225. Therefore, the district court concluded that "the IMDA does not, at least in the first step of the *Cotton Petroleum* analysis, differ in any significant way from the IMLA." *Id.* at 221. On appeal, our review of the statutory language and legislative history of the IMDA does not suggest that a different conclusion is warranted. That is, we agree with the district court that nothing in the IMDA evidences a clear congressional intent to prohibit—or to authorize—the taxation of agreements executed under that Act.

The Tribe asserts that the "IMDA was a step in the direction of tribal self-determination, freeing Indian tribes from the shackles of the anachronistic statutory authorizations of the past," which it asserts "should weigh heavily in any Indian preemption analysis." Aplee. Br. at 25 n. 10. However, the Tribe fails to cite any relevant, persuasive statutory language or legislative history that evidences an express or implied congressional intent to prohibit state taxation of agreements executed under the IMDA.

The only mention of taxation in the legislative history of the IMDA appears in the House Report, which states:

> In a statement submitted for the record, the governor of the State of Montana recommended an amendment[,] which would have had the effect of authorizing state taxation of the *non-Indian* portions of, or *activity under,* minerals

> agreement[s]. The committee declined to recommend the amendment.
>
> The Supreme Court, in recent years, has begun to illuminate this issue under existing law without difficulty.... If there was a need for congressional clarification of the law in this area, the committee determined that this was not the appropriate vehicle.

H.R. Rep. 97–746, at 8–9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3465, 3470–71 (emphasis added). In other words, express authority for state taxation of "non-Indian ... activities under" mineral leases executed pursuant to the IMDA was put on the table; however, the Committee refrained from including this in the Act, choosing instead to defer to the Supreme Court's evolving jurisprudence on the topic. This statement, if anything, evidences congressional neutrality on the issue of state taxation under the Act. It does not, on the other hand, evidence a clear congressional intent to prohibit taxation of activity carried out under the IMDA.

Furthermore, when the IMDA was enacted in 1982, the doctrine of intergovernmental tax immunity had long been abolished, and it was well-established that non-Indian oil and gas lessees were subject to state taxation, absent clear disapproval by Congress. *See Cotton Petroleum,* 490 U.S. at 175–76, 179–80, 109 S.Ct. 1698 (stating that by 1938 "oil and gas lessees operating on Indian reservations were subject to nondiscriminatory state taxation as long as Congress did not act affirmatively to pre-empt the state taxes"); *id.* (stating that "a lessee's oil production on Indian land is ... not 'automatically exempt from state taxation,' " but "Congress does, of course, retain the power to grant such immunity"

(quoting *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 150, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973))). Had Congress intended to absolutely prohibit (or absolutely permit) state taxation under the IMDA, we think it would have been more clear in expressing such intent. Thus, we conclude that the IMDA is silent regarding the issue of taxation—that is, like the IMLA, the IMDA neither expressly prohibits nor expressly authorizes state taxation.[23]

B. Historical Backdrop of Tribal Sovereignty

We look next to the "historical backdrop" of relevant tribal sovereignty in the field at issue—*viz.,* in the field of oil and gas leasing on treaty and statutory reservations. In *Cotton Petroleum,* the Supreme Court found that there was no history of tribal independence from taxation to serve as a "backdrop" to the analysis because, "at least as to Executive Order reservations, state taxation of

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[23] The Tribe also cites the Indian Tribal Energy Development and Self–Determination Act of 2005, 25 U.S.C. § 3501–04 (enacted as Title V of the Energy Policy Act of 2005, Pub.L. No. 109–58, 119 Stat. 594 (2005)), in support of its position. The general purpose of this Act is "[t]o assist Indian tribes in the development of energy resources and further the goal of Indian self-determination" through the establishment of federal programs and provision of federal grants and loans to aid tribal energy-resource-development efforts. 25 U.S.C. § 3502; *see id.* at §§ 3502–05. However, the Tribe does not cite to any statutory provision or relevant piece of legislative history regarding that Act that evidences a clear congressional intent to preempt state taxation of oil and gas lessees operating on tribal lands. Nor does this materially alter the relevant history of tribal sovereignty in the field at issue, which we discuss *infra.*

nonmember oil and gas lessees was the norm from the very start." 490 U.S. at 182, 109 S.Ct. 1698. The Ute Reservation, however, is a treaty and statutory reservation.

Congress first authorized mineral leasing on statutory and treaty reservations in 1891. *See* Act of Feb. 28, 1891 ("1891 Act"), ch. 383, 26 Stat. 795 (codified at 25 U.S.C. § 397). At that time, the doctrine of "intergovernmental tax immunity" was the prevailing law, under which "States were powerless to impose severance taxes on oil produced on Indian reservations unless Congress expressly waived that immunity." *Cotton Petroleum,* 490 U.S. at 181, 109 S.Ct. 1698 (discussing *Gillespie v. Oklahoma,* 257 U.S. 501, 42 S.Ct. 171, 66 L.Ed. 338 (1922)). Congress acted to expressly waive that immunity in regard to oil and gas lessees on tribal lands through the Act of May 29, 1924 ("1924 Act"), ch. 210, 43 Stat. 244 (codified at 25 U.S.C. § 398), which in clear language *authorized* states to tax oil and gas operations on treaty and statutory reservations. *See* 25 U.S.C. § 398 (stating that "the production of oil and gas and other minerals on [tribal lands subject to lease for mining purposes] may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands"). Therefore, as the district court noted, oil and gas leases on treaty reservations were immune from state taxation from 1891 until 1924, more than three decades of complete independence from state taxation. *See, e.g., British–Am. Oil Producing Co. v. Bd. of Equalization of Mont.,* 299 U.S. 159, 163–66, 57 S.Ct. 132, 81 L.Ed. 95 (1936) (holding that the State of Montana, under the explicit authority of the 1924 Act, could impose a tax on non-

Indian oil and gas lessees operating on tribal land, where the leases were entered into under that Act).

After the 1924 Act was passed, oil and gas leases on statutory and treaty reservations were expressly subject to state taxation; that is, in complete contrast to the previous era of tax immunity, oil and gas operations on statutory and treaty reservations were wholly exposed to state taxation.[24] FN24 This era of waived immunity lasted until 1938—a period of approximately fifteen years—when Congress enacted

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[24] The State raises the issue of whether the 1924 Act "foreclose [s] the Tribe's contention that the New Mexico taxes in question here are preempted." Aplt. Opening Br. at 2. In other words, the State argues that the 1924 Act may operate as an express authorization of the five state taxes at issue, thereby ending the analysis. This argument is wholly without merit. The 1924 Act only waived immunity for oil and gas leases executed under the 1891 Act and its 1924 amendment. *See Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 767–68, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) (stating that "it is clear that if the tax proviso [in the 1924 Act] survives at all, it reaches only those leases executed under the 1891 Act and its 1924 amendment"). Because all the leases and agreements on the Ute Reservation were executed under the IMLA and IMDA, the tax provision does not apply even if it does still have any force, which we do not posit here.

The State also raises the issue of whether the Indian Oil Act of 1927, which simultaneously authorized oil and gas leases on executive reservations and waived immunity from state taxation on such leases, likewise operates to authorize the five taxes. However, this argument is equally unmeritorious. The Oil Act of 1927 only applied to oil and gas leases on *executive* reservations, not *statutory and treaty* reservations such as the Ute Reservation, *see* 25 U.S.C. § 398(a); therefore, it is inapplicable and irrelevant.

the IMLA, which, as discussed *supra,* "neither expressly permits state taxation nor expressly precludes it." *Cotton Petroleum,* 490 U.S. at 177, 109 S.Ct. 1698. As we have previously concluded, neither the IMDA nor any other federal statute has materially altered the relevant taxation landscape since that time. Therefore, since 1938, oil and gas lessees operating on Indian reservations have been subject to nondiscriminatory state taxation, as long as Congress has not acted to expressly or impliedly preempt such taxation. *See id.* at 182–83, 109 S.Ct. 1698; *see also* R. at 225 (observing that after the IMLA was enacted in 1938, "state taxation of leases was neither expressly authorized by Congress nor expressly prohibited under the Supreme Court's doctrine").

Unlike executive reservations—which had "no history of tribal independence from state taxation of [oil and gas] lessees," *Cotton Petroleum,* 490 U.S. at 182, 109 S.Ct. 1698—treaty and statutory reservations were immune from state taxation from 1891 to 1924, more than three decades. The district court concluded that this " 'important backdrop' of Tribal sovereignty ... acts as a thumb on the scales in favor of the [Ute Tribe] that the United States Supreme Court in *Cotton Petroleum* did not afford the Jicarilla Apache Tribe." R. at 225–26. The district court was correct in noting that this "historical backdrop" of relevant tribal sovereignty—namely, the period of tax immunity from 1891 until 1924—was not present in *Cotton Petroleum.* However, unlike the district court, we do not consider this distinction, as a legal matter, to be so "significant" as to tilt the scales in the Tribe's favor.

As stated above, since the period of complete immunity from state taxation ended in 1924, for a period of more than eight decades, oil and gas lessees on statutory reservations have been either expressly subject to state taxation or have been subject to such taxation absent clear congressional disapproval. In other words, a review of the relevant history of taxation in this field demonstrates that for the lion's share of that history, state taxation has been permitted to some extent. Although this history—which includes a shorter period of immunity followed by a much longer period of exposure to taxation—is relevant and should be taken into consideration, we do not find that the "scales," as the district court put it, are tipped significantly in the Tribe's favor. That is, we do not find that this "backdrop" weighs heavily in favor of a finding of preemption, particularly when viewed in conjunction with the remainder of our analysis. *See Rice,* 463 U.S. at 720, 103 S.Ct. 3291 ("If ... we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the 'backdrop' of tribal sovereignty." (citing *Washington,* 447 U.S. at 154–59, 100 S.Ct. 2069; *Jones,* 411 U.S. 145, 93 S.Ct. 1267)).

C. State, Federal, and Tribal Interests

Against this "backdrop," we must weigh the state, federal, and tribal interests at stake in order to determine whether the New Mexico taxes are preempted. *Cotton Petroleum,* 490 U.S. at 176–77, 109 S.Ct. 1698; *Ramah,* 458 U.S. at 838, 102 S.Ct. 3394; *Bracker,* 448 U.S. at 145, 100 S.Ct. 2578. As discussed *infra,* the facts demonstrate that this case falls more in line with *Cotton Petroleum* than *Bracker* and *Ramah.* Therefore, we conclude—even

when considering the relevant legislation and historical backdrop—that the five challenged taxes are not preempted by federal law in this instance.

As previously noted, in assessing the relevant federal and tribal interest, the Supreme Court has looked primarily to the extent of the federal (and, if applicable, tribal) regulatory scheme. In *Cotton Petroleum,* the Supreme Court found that although the federal regulations governing oil and gas operations on the reservation were "extensive, they [were] not exclusive, as were the regulations in *Bracker* and *Ramah.*" 490 U.S. at 186, 109 S.Ct. 1698 (footnote omitted). *See also Ramah,* 458 U.S. at 839, 843, 102 S.Ct. 3394 (noting that the "comprehensive and pervasive" federal scheme "left the State with no duties or responsibilities"); *Bracker,* 448 U.S. at 149, 100 S.Ct. 2578 (stating that the "pervasive" and "comprehensive" federal scheme left "no room for [state] taxes," especially since respondents were "unable to identify any regulatory function ... performed by the State"). The Supreme Court's conclusion in *Cotton Petroleum* that the federal regulations were not "exclusive" was based on the finding that the State regulated "the spacing and mechanical integrity of the wells located on the reservation." *Id.* at 186–87, 109 S.Ct. 1698. As Justice Blackmun explained in dissent, under the applicable regulatory scheme, at least in terms of well spacing, "state law applie[d] not of its own force, but only if its application [was] approved by the [BLM]." *Id.* at 206 n. 9, 109 S.Ct. 1698 (Blackmun, J., dissenting). Moreover, in *Cotton Petroleum* it was undisputed that the federal regulations in force also addressed well spacing. *See id.* at 186 n. 16, 109 S.Ct. 1698 (stating that the applicable "federal regulations

address the spacing, drilling, and plugging of wells and impose reporting requirements concerning production and environmental protection" (citing 43 C.F.R. §§ 3160.0–1 to 3186.4 (1987))). The State, therefore, did not have direct authority to regulate well spacing; it "regulated" well spacing only in the sense that the federal government, which had direct authority to regulate in that area, would often adopt state standards.[25] In other words, although the federal government had ultimate authority to regulate well spacing, the State and the federal

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[25] *See also* Rep. Br. of Aplt. Cotton Petroleum Corp., at 8 & n. 12, *Cotton Petroleum v. New Mexico,* 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989) ("A review of the [IMLA] and its regulations reveals that they entrust responsibility in the federal and tribal governments for *all* aspects (financial, environmental, conservation, marketing, safety and transportation) of Reservation oil and gas operations," with one possible exception: "[w]hile 43 C.F.R. § 3162.3–1 regulates Jicarilla Indian Reservation well spacing, the United States, the Tribe, and New Mexico coordinate well spacing on a volunteer basis. Otherwise it is absolutely clear that federal law and federal and tribal governmental programs relieve New Mexico of any responsibility to Jicarilla oil and gas development."). We are of course free to reference the filings in *Cotton Petroleum* for whatever guidance they might provide for our resolution of the instant matter. *See United States v. Ahidley,* 486 F.3d 1184, 1192 n. 5 (10th Cir. 2007) ("[W]e may exercise our discretion to take judicial notice of publicly-filed records in our court and certain other courts concerning matters that bear directly upon the disposition of the case at hand."); *see also St. Louis Baptist Temple v. Fed. Deposit Ins. Corp.,* 605 F.2d 1169, 1172 (10th Cir. 1979) ("[I]t has been held that federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.").

government, in practice, had a cooperative regulatory relationship with regard to well spacing. In *Cotton Petroleum,* the State's contribution to this cooperative relationship was enough to support a conclusion that the federal regulations were not "exclusive," although they were "extensive," and therefore did not necessarily preempt the state taxes.

The relevant federal regulatory scheme governing oil and gas operations in this case is largely the same as the regulatory scheme at play in *Cotton Petroleum*.[26] Notably, under the federal regulatory scheme at issue, the State still plays a supporting regulatory role in that BLM often adopts the State's well-spacing and setback standards and other NMOCD decisions; the district court's findings likewise acknowledge the existence of this cooperative regulatory scheme. *See* R. at 234 (noting that "the State of New Mexico regulations are

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[26] As the Tribe correctly asserts, the regulations applicable in *Cotton Petroleum* have been amended, and new regulations implementing the IMDA have been promulgated since the Court's decision in 1989. *See* Aplee. Br. at 26–32 (discussing developments in the regulatory framework since 1989, and examining the purported exclusivity of the federal regulations); *see also* 25 C.F.R. pt. 225 (implementing the IMDA). However, the overall statutory and regulatory framework—in terms of the IMLA, which governs almost every agreement entered into by the Tribe—is similar. More importantly, the statutory and regulatory framework governing oil and gas operations on the Ute Reservation, rather than the legal framework governing the IMLA leases or IMDA agreements themselves, is substantially the same as it was when *Cotton Petroleum* was decided. *See* 43 C.F.R. pt. 3160. In other words, it is this area—*viz.,* regulation of oil and gas operations on the Reservation—that we find most important for purposes of our analysis here.

adopted by the BLM"); *id.* at 193 (explaining that BLM and NMOCD entered into a memorandum of understanding, in which BLM adopted the state standards for well spacing and setbacks on Indian lands); *id.* at 229 ("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" (quoting 43 C.F.R. § 3161.3–1(a))). This is precisely the type of state "regulation" that was before the Supreme Court in *Cotton Petroleum.*[27] Therefore, even though the federal regulations governing oil and gas operations on the Ute Reservation are "extensive," they are not "exclusive" for purposes of our analysis, as understood by the Supreme Court in *Cotton Petroleum.*[28]

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[27] In addition, the NMOCD also established the oil and gas pools from which the oil and gas operators extract the mineral resources.

[28] The district court concluded that the federal regulatory scheme was "exclusive," R. at 228–32, despite its acknowledgment that the federal government regularly adopted NMOCD standards and decisions regarding oil and gas operations on the Reservation. The district court labeled this a mixed question of law and fact. *Id.* at 228. However, a finding that federal regulations are "exclusive"—in other words, 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, 100 S.Ct. 2578—is better characterized a legal conclusion that we should review de novo. Even if we were to review the "exclusivity" determination under a deferential standard, this conclusion (at least in this context) would likely be erroneous as it contradicts the Supreme Court's determination in *Cotton Petroleum.*

Next, we look to the economic burden of the tax. In *Bracker, Ramah*, and *Cotton Petroleum,* the Supreme Court found that the economic burden fell on the entity that was directly responsible for the amount of taxes paid to the State.[29] For example, the Court found that the economic burden fell on the tribes in *Bracker* and *Ramah* because the tribes were obligated in both of those cases to fully reimburse the non-Indian entities for the amount of taxes paid to the State. In other words, the cost of the taxes had

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[29] We recognize that the Supreme Court arguably has adopted a narrow view of the term "economic burden." One could reasonably contend that the economic burden of a state tax on non-tribal entities doing business with a tribe will almost always fall in some fashion on the tribe—even if only indirectly. However, as discussed *infra,* the Supreme Court has previously declined to include such "indirect" and "insubstantial" economic effects within the conceptual scope of the term "economic burden." *See Cotton Petroleum,* 490 U.S. at 187, 109 S.Ct. 1698. Instead, in identifying the entity that shoulders the economic burden of the state tax at issue, the Court has looked to the entity that is directly responsible for paying the amount of the tax.

However, we note that this does not necessarily mean that indirect financial burdens on a tribe are categorically barred from the analysis. Indeed, the *Cotton Petroleum* Court noted that the indirect economic burdens identified by the tribe in that case were "*too* indirect and *too* insubstantial to support [a] claim of pre-emption." *Cotton Petroleum,* 490 U.S. at 187, 109 S.Ct. 1698 (emphasis added). The underscored language suggests that *some* indirect economic burdens of a *substantial* nature might lend support to a finding of preemption under certain circumstances. However, as further discussed *infra,* the indirect burdens asserted by the Ute Tribe in this case are similar in nature to those rejected by the Supreme Court in *Cotton Petroleum;* therefore, they do not factor into our analysis.

been passed directly on to the tribes and they were not ultimately paid by the non-Indian entities. *See Ramah,* 458 U.S. at 835, 102 S.Ct. 3394 (explaining that the contractor had "included the state gross receipts tax as a cost of construction in [its] bid," and therefore the company "was reimbursed by the [tribe] for the full amount [of taxes] paid"); *Bracker,* 448 U.S. at 140, 151, 100 S.Ct. 2578 (stating that the "economic burden of the asserted taxes will ultimately fall on the Tribe," because the Tribe had agreed to reimburse the company for all expenses incurred in connection with its operations, including the state taxes).

By contrast, in *Cotton Petroleum,* the economic burden fell on the non-Indian operators because they paid the taxes, without protest, and the tribe did not reimburse or compensate the operators in any way for those payments. 490 U.S. at 168, 173 n. 9, 185, 109 S.Ct. 1698. The Jicarilla Apache Tribe argued that it bore the burden of the taxes at issue because they interfered with the tribe's ability to raise its own taxes on oil and gas operations and would diminish the desirability of on-reservation leases. In response, the *Cotton Petroleum* Court stated:

> [i]t is, of course, reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate. 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, is simply too indirect and too insubstantial to support Cotton's claim of pre-emption. To find pre-emption of state

> taxation in such indirect burdens on this broad congressional purpose, absent some special factor such as those present in *Bracker* and *Ramah Navajo School Bd.,* would be to return to the pre–1937 doctrine of intergovernmental tax immunity. Any adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe would be ground to strike the state tax. Absent more explicit guidance from Congress, we decline to return to this long-discarded and thoroughly repudiated doctrine.

Id. at 186–87, 109 S.Ct. 1698 (footnote omitted). In other words, in rejecting the tribe's argument for preemption in that case, the Court concluded that the indirect burdens on the tribe's ability to raise its own taxes or attract new leases—as opposed to the more direct burden of ultimately bearing the cost of the taxes paid to the State—were insufficient to establish that the economic burden of the taxes fell on the tribe.

In this instance, the five state taxes are paid by the non-Indian operators and, as in *Cotton Petroleum,* those costs are not passed directly on to the Tribe; that is, the Tribe does not reimburse or compensate the operators for the amount of taxes paid to the State. *See* R. at 203 ("The leases and agreements do not directly pass the cost of the five New Mexico taxes on the [Tribe]."). Furthermore, as in *Cotton Petroleum,* the district court found that regardless of the status of the five state taxes (and Resolution No. 3874), 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." R. at 203 (emphasis

added); *cf. id.* at 206 ("There is no record evidence that the imposition of the five New Mexico taxes substantially interferes with the [Tribe's] ability to govern itself."). Therefore, the economic burden—as it was viewed by the Supreme Court in *Bracker, Ramah*, and *Cotton Petroleum*—falls on the non-Indian operators, not on the Tribe.

Nevertheless, the district court found that, even though the taxes were paid directly by the non-Indian operators and were not passed on to the Tribe, the economic burden of the taxes—as a real-world matter—fell on the Tribe because "the evidence shows that the taxes impair, in practically one-to-one proportion, the ability of the [Tribe] to impose additional taxes." *Id.* at 226; *see also id.* at 227 (stating that in the absence of the five state taxes, the Tribe "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"); *id.* (indicating that even if the resolution was rescinded, absent the five state taxes, "oil and gas production on the [Reservation] would become more attractive relative to oil and gas production elsewhere in New Mexico, which would result in increased production" and therefore an increase in revenues from royalties and current taxes).

However, these indirect economic burdens on the Tribe's ability to increase its own taxes and attract new leases are akin to the indirect burdens that the Supreme Court dismissed in *Cotton Petroleum. See* 490 U.S. at 186–87, 109 S.Ct. 1698. "[M]arginal effect[s] on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of

the Tribe to increase its tax rate" are impacts that are "simply too indirect and too insubstantial to support [a] claim of pre-emption." *Id.* at 187, 109 S.Ct. 1698.[30] The fact that the Ute Tribe has enacted a resolution providing for a contingent increase in taxes does not materially change this result; the crux of the district court's conclusion still centers on the indirect burden imposed on the Tribe's ability to raise taxes or attract new leases, albeit through the implementation of Resolution No. 3874. In any event, as stated above, the district court found that regardless of the status of the five state taxes and the resolution, the Tribe's authority to raise its own oil and gas taxes is not impaired.[31] Accordingly, the

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[30] In concluding that indirect burdens of this kind could not support a claim of preemption, the Supreme Court stated that "[i]t is important to keep in mind that the primary burden of the state taxation falls on the non-Indian taxpayers," in that the non-Indian companies paid the taxes and did not directly pass the cost onto the tribe. *Cotton Petroleum,* 490 U.S. at 187 n. 18, 109 S.Ct. 1698. This reasoning applies with equal force in the present case because, as we have already established, the primary burden of the five state taxes falls on the non-Indian oil and gas lessees, not the Tribe. However, as previously discussed, *see supra* note 29, neither our holding nor the Supreme Court's holding in *Cotton Petroleum* purports to categorically bar the consideration of indirect economic burdens shouldered by a tribe. We simply hold that the indirect burdens asserted by the Ute Tribe—which are similar in nature to those rejected by the *Cotton Petroleum* Court—do not support a finding of preemption in this case.

[31] Although this ability is theoretically limited in regard to one agreement that caps the Tribe's tax and royalty revenues at 30%, the district court found "th[at] agreement[ ] [is] currently substantially below 30%," and an increase to 30% would be "substantial." R. at 203–04.

economic burden relied upon by the district court, at least for present purposes, is not a proper justification for finding that the taxes are preempted.

Lastly, we must consider the State's interest—more specifically, the State's asserted justifications for imposing the taxes. In order to justify a state tax on non-Indian actors operating on Indian land, the State generally must be able to show that it "seeks to assess [the] taxes in return for governmental functions it performs for those on whom the taxes fall." *Bracker,* 448 U.S. at 150, 100 S.Ct. 2578. A "generalized interest in raising revenue" is not sufficient to justify the state taxation in this context. *Id.; see also Ramah,* 458 U.S. at 845, 102 S.Ct. 3394 (stating that "the generalized desire to collect revenue" was not a proper justification for imposing the state tax).

In *Bracker* and *Ramah,* the Court noted that it was "unable to identify *any* legitimate regulatory function or service [that the state] performed ... that would justify the assessment of [the] taxes." *Cotton Petroleum,* 490 U.S. at 184, 109 S.Ct. 1698 (emphasis added) (quoting *Bracker,* 448 U.S. at 148–49, 100 S.Ct. 2578) (internal quotation marks omitted). Those cases "involved *complete* abdication or noninvolvement of the State in the on-reservation activity." *Id.* at 185, 109 S.Ct. 1698 (emphasis added). On the other hand, in *Cotton Petroleum,* the State provided "substantial services" to both the Jicarilla Apache Tribe and the non-Indian operator, costing the State approximately $3 million per year, *id.,* which served as a sufficient justification for the taxes.

In this case, the district court itself acknowledged that the State "is not absolutely uninvolved in the oil

and gas operations on the [Reservation]." R. at 234. As the district court noted, the services provided to the oil and gas operators on the Reservation include "a hearing process for resolving disputes between operators, publicly available geologic records, publicly available production records, and records of sales and transfers," as well as "plugging of abandoned wells" and "environmental cleanup and site inspection." *Id.* at 199. However, because the evidence demonstrated that these services were rarely, if ever, utilized by the oil and gas operators or the Tribe in connection with the on-reservation activity, the district court found that these services only were offered "in theory" and only provided a "*de minimis*" benefit. *Id.* at 201, 232–33. Based on this reasoning, the district court concluded that the State's interest was "minimal." *Id.* at 233. We disagree.

First, as previously discussed, the State plays a supporting regulatory role in the regulation of well spacing, setbacks, and non-standard well location. This "specific, legitimate regulatory interest" serves as a partial justification for the imposition of the state taxes. *Ramah,* 458 U.S. at 843, 102 S.Ct. 3394; *see Bracker,* 448 U.S. at 144, 100 S.Ct. 2578 (stating that "any applicable regulatory interest of the State must be given weight" (citing *McClanahan v. State Tax Comm'n of Ariz.,* 411 U.S. 164, 171, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973))). We also afford some weight to the services, enumerated by the district court, that are provided on the Reservation—such as a hearing process and the provision of records—despite the fact that the Tribe and the lessees scarcely utilize them. In other words, this is not a case—like those before the Supreme Court in *Bracker* and *Ramah*—"involv[ing] complete abdication or

noninvolvement of the State in the on-reservation activity." *Cotton Petroleum,* 490 U.S. at 185, 109 S.Ct. 1698.

However, the more important state service—and the one that primarily justifies the New Mexico taxes at issue—is the off-reservation infrastructure used to transport the oil and gas after it is severed. Oil extracted from the Reservation "is transported by truck through New Mexico to refineries outside the [Reservation]" on highways that are constructed and maintained by the State. R. at 184, 200. Natural gas extracted from the Reservation is transported "through gathering pipelines in the [Reservation] to main lines in New Mexico." *Id.* at 184, 201. The State regulates these pipelines in that it, *inter alia,* "provides the power [and] authority to the pipeline companies to condemn property ... to construct the pipelines" and "inspects the pipelines for safety purposes." Oral Argument at 11:05; *see also, e.g.,* Pipeline Safety Act, N.M. Stat. Ann. §§ 70–3–1 to –22; Gathering Line Land Acquisition Act, N.M. Stat. Ann. §§ 70–3A–1 to –7.

The district court found that "[t]he State provides *substantial* services by regulating the off-reservation infrastructure that makes transport of oil and gas possible." R. at 201 (emphasis added). In fact, the evidence presented at trial made clear that "[w]ithout the off-reservation infrastructure in New Mexico to transport oil and gas, the economic value of the oil and gas produced on the [Reservation] would be *substantially less.*" *Id.* (emphasis added). The State's counsel highlighted this point during oral argument:

> The gas only takes on significant economic value when it is processed. It is processed in New Mexico, off the Reservation. It travels

> from the Reservation to the processing plant on gathering lines and pipelines that are regulated by the State of New Mexico and whose existence is made possible by New Mexico statutes.....
>
> ....We're dealing with natural gas, which only obtains its value—a value which drives the value of the royalty enjoyed by the Tribe, the tribal taxes, and the income of the non-tribal lessees—through [the lessees'] utilization of this whole infrastructure New Mexico has made available.

Oral Argument at 9:33, 12:03. We conclude that this "substantial service" provided by the State—which "substantially" contributes to the economic value of the resources extracted—serves as a legitimate and important justification for the imposition of the State's taxes.[32] The State's asserted interest amounts to much more than a "general desire to raise revenue." *Ramah,* 458 U.S. at 839, 102 S.Ct. 3394; *Bracker,* 448 U.S. at 150, 100 S.Ct. 2578. In other words, this is clearly "not a case in which the State has had nothing to do with the on-reservation activity, save tax it." *Cotton Petroleum,* 490 U.S. at 186, 109 S.Ct. 1698.[33]

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[32] We do not purport to hold that off-reservation infrastructure or services may be considered in *every* instance where they provide a benefit of *any* magnitude to the on-reservation activity. We do, however, consider such infrastructure and services here due to their undisputed "substantial" benefit to the value of the on-reservation activity.

[33] "Nor is this a case in which an unusually large state tax has imposed a substantial burden on the Tribe." *Cotton Petroleum,* 490 U.S. at 186, 109 S.Ct. 1698. In fact, as the

The district court concluded, as the Tribe argues on appeal, that *Ramah* prohibits any consideration of the off-reservation infrastructure in the analysis. In *Ramah,* the Supreme Court concluded that the state services provided to the non-Indian contractor for its activities off the reservation could not serve as a justification for taxing the on-reservation activity. 458 U.S. at 843–44, 102 S.Ct. 3394. The Court posited that "the state tax revenues derived from [the contractor's] off-reservation business activities [were] adequate to reimburse the State for the services it provide [d]" to the contractor off the reservation. *Id.* at 844 n. 9, 102 S.Ct. 3394. Therefore, *Ramah* conceivably could be read—as the Tribe urges us to read it here—as categorically barring the consideration of off-reservation services provided to non-Indian actors as the predicate for taxes imposed on on-reservation activity.

However, what the *Ramah* Court stated was that the off-reservation services provided to the non-Indian entity could not serve as "a legitimate justification for a tax whose ultimate burden [fell] *on the tribal organization.*" *Id.* at 844, 102 S.Ct. 3394 (emphasis added). In other words, because the economic burden ultimately fell *on the tribe,* the services that the state provided *to the contractor* for activity *off the reservation* were not a sufficient justification. *Cf. Bracker,* 448 U.S. at 150, 100 S.Ct. 2578 (noting that a state generally may "seek[ ] to assess taxes in return for governmental functions it performs for those *on whom the taxes fall* "). In the

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district court concluded, "[t]here is no record evidence that the imposition of the five New Mexico taxes substantially interferes with the [Ute Tribe's] ability to govern itself." R. at 206.

present case, unlike in *Ramah,* the economic burden of the tax falls on the non-Indian operators, not the Tribe.

Furthermore, there is no indication that the asserted off-reservation services provided to the non-Indian contractor in *Ramah* in any way related to the on-reservation activity the state sought to tax. In contrast, the services provided off the reservation in this instance substantially benefit and relate to the on-reservation activity being taxed. In fact, without the off-reservation infrastructure, the economic value of the resources—which "drives the value of the royalty enjoyed by the Tribe, the tribal taxes, and the income of the non-tribal lessees," Oral Argument at 12:08—"would be *substantially less.*" R. at 201 (emphasis added). This case, therefore, can be distinguished from *Ramah.*

The Supreme Court's decision in *New Mexico v. Mescalero Apache Tribe* 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, regardless of whether those services or functions are carried out on or off the tribal reservation. In that case, the issue was whether the State of New Mexico could regulate the hunting and fishing activities of non-Indians on the tribe's reservation. *Mescalero Apache Tribe,* 462 U.S. at 325, 103 S.Ct. 2378. At the outset, the Court noted that "[t]he exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State *in connection with* the on-reservation activity." *Id.* at 336, 103 S.Ct. 2378 (emphasis added) (citing *Ramah,* 458 U.S. at 843–44 & n. 7, 102 S.Ct. 3394; *Bracker,* 448 U.S. at 148–49,

100 S.Ct. 2578). In concluding that New Mexico's authority was preempted by federal law, the Court noted that "the State ha[d] pointed to no services it ha[d] performed *in connection with* hunting and fishing by nonmembers which justif[ied] imposing a tax in the form of a hunting and fishing license," and stated that the State's "general desire to obtain revenues [wa]s simply inadequate to justify the assertion of concurrent jurisdiction." *Id.* at 343, 103 S.Ct. 2378 (emphasis added); *see also Barona Band of Mission Indians v. Yee,* 528 F.3d 1184, 1193 (9th Cir.2008) ("We recognize that the state interest strengthens where there is a nexus between the taxed activity and the government function provided ...." (citing *Ramah,* 458 U.S. at 843, 102 S.Ct. 3394)). The off-reservation services that the State provides in this instance are undoubtedly "connected to" the on-reservation activity being taxed.

The district court's contrary determination that off-reservation infrastructure and services provided by the State should "play no part in the analysis," R. at 234, was based on two observations. First, the district court stated that "*Ramah* instructs that services provided outside the reservation are not to be taken into account in *Bracker* balancing." *Id.* As discussed *supra,* however, the Supreme Court's decision in *Ramah* does not categorically bar consideration of off-reservation services provided to the taxed entity. And we have further distinguished *Ramah* from the instant case because here the off-reservation services that the State provides substantially benefit and relate to the on-reservation activity being taxed.

The district court's refusal to consider the off-reservation infrastructure was also based on its

observation that "[i]n *Bracker,* the economic value of the 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." *Id.* (citing *Bracker,* 448 U.S. at 146–52, 100 S.Ct. 2578). However, in *Bracker* the Supreme Court indicated that the timber was harvested, processed, and sold *on the reservation. See* 448 U.S. at 139, 100 S.Ct. 2578 (stating that the logging company's activities—which included "fell[ing] trees, cut[ting] them to the correct size, and *transport[ing] them to [the tribe's] sawmill* in return for a contractually specified fee"—were performed "*solely on the Fort Apache Reservation,*" and that the timber was "manage[d], harvest[ed], *processe[d], and s[old] ... on the reservation*." (emphasis added)). Therefore, contrary to the district court's statement, it appears that the timber harvested from the reservation in *Bracker* took on its economic value *on the reservation* without the required use of any off-reservation infrastructure provided by the state. By contrast, the mineral resources severed from the Ute Reservation only take on significant economic value when they are processed off the Reservation, which is only made possible by the off-reservation infrastructure. And furthermore, we also note that in *Bracker,* unlike the present case, the economic burden of the tax fell on the tribe. Accordingly, we cannot agree with the district court's decision to disregard the "substantial services" provided to the lessees off the Reservation. R. at 201.

In sum, the Supreme Court has not instructed that the type of off-reservation services presently before us—that substantially relate to and benefit

the on-reservation activity and that benefit the entity that directly bears the economic burden of the tax—cannot be considered under *Bracker, Ramah*, and *Cotton Petroleum.* What the Supreme Court has made clear, however, is that we are to conduct a "particularized examination" that is "sensitive to the particular facts and legislation involved." *Cotton Petroleum,* 490 U.S. at 177, 109 S.Ct. 1698. In this specific situation, where the burden of the tax falls on the non-Indian lessees and the off-reservation infrastructure substantially benefits the on-reservation activity, we think it is appropriate for us to consider the off-reservation infrastructure as part of the equation.

In conclusion, the evidence presented, particularly in light of the Supreme Court's decision in *Cotton Petroleum,* demonstrates that (1) the federal regulatory scheme is not "exclusive," although it is indeed "extensive"; (2) the economic burden—as that concept was applied by the Supreme Court in *Bracker, Ramah*, and *Cotton Petroleum*—falls on the non-Indian operators, not on the Tribe; and (3) the State has asserted a sufficient justification for imposing the taxes. Furthermore, although there is an "historical backdrop" of relevant tribal sovereignty in this area, which was not present in *Cotton Petroleum,* this backdrop is not so strong as to completely tip the scales in the Tribe's favor. Therefore, under the flexible preemption analysis applied in *Bracker, Ramah*, and *Cotton Petroleum,* we hold that the five state taxes are not preempted by federal law, even when considered in light of the purposes of the relevant legislation and the history of tribal sovereignty in the field.

CONCLUSION

Based on the foregoing, we **REVERSE** the district court's judgment and **REMAND** the case for further proceedings not inconsistent with this opinion.

LUCERO, J., dissenting.

Although I concur in my colleagues' statement of the law, I cannot do so with respect to their application of the law to the facts. In contrast to the Jicarilla Apache Tribe in *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989), the Ute Mountain Ute Tribe in the case before us presented evidence and the district court found that: (1) New Mexico's taxation of on-reservation oil and gas extraction imposes a substantial economic burden on the tribe; and (2) neither the tribe nor private oil and gas companies receive any on-reservation economic benefit in return. These findings compel the conclusion that the New Mexico taxes are preempted. It is not enough to correctly state the law; by not adhering to it, we deny parties their due justice and distort the jurisprudence of the Supreme Court. Thus I must respectfully dissent.

I

My colleagues thoughtfully explain the basic legal principles that distinguish Indian law preemption from traditional implied preemption doctrine. (Majority Op. 1185–90.) I have no problem with most of that discussion. Although "generalizations on [Indian law preemption remain] treacherous," *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 141, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), the roadmap for this case was drawn by the Supreme Court in *Cotton Petroleum,* which examined the same five New Mexico taxes at issue in this case as applied

on the Jicarilla Apache reservation. 490 U.S. at 168–69, 109 S.Ct. 1698. Four factors that control this appeal were enumerated by the Supreme Court[34]: (1) the historical backdrop of tribal sovereignty in an area; (2) the extent of the federal regulatory scheme; (3) the tribe's sovereign and economic interests; and (4) the state's interests as reflected by services that it provides. *Id.* at 177, 182, 184–86, 109 S.Ct. 1698.

I agree with the majority's conclusions as to the first and second of these factors. The history of Ute Mountain Ute sovereignty over oil and gas leasing is relevant but not decisive (Majority Op. 1193–94), and the federal regulatory scheme is "extensive [but] not exclusive" (Majority Op. 1189). But, given the district court's uncontested factual findings, the final two factors lead to my conflicting point of view.

II

There is no dispute; indirect taxes—that is taxes paid by an entity other than the tribe itself—may burden an Indian tribe enough to justify a finding of preemption in some circumstances. *See Cotton Petroleum,* 490 U.S. at 187 n. 17, 109 S.Ct. 1698;

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[34] In other contexts, the Supreme Court has considered additional factors in determining if a state tax is preempted, including whether there is value added on the reservation by the regulated activity, *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 219–20, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), whether the tribe is simply marketing a tax exemption on the reservation, *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 155, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), and whether the regulated activity has an off-reservation effect that "necessitate[s] State intervention," *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 336, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983)

Montana v. Crow Tribe of Indians, 484 U.S. 997, 108 S.Ct. 685, 98 L.Ed.2d 638 (1988) *summarily aff'g* 819 F.2d 895 (9th Cir.1987); *Ramah Navajo Sch. Bd. v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 836–37, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982). The majority concedes as much. (Majority Op. 1196 n. 29.)

The principle that an indirect economic burden on a tribe may support preemption of a state tax originates in *Ramah Navajo.* 458 U.S. at 835–36, 846–47, 102 S.Ct. 3394. There, New Mexico taxed private construction companies for activities on the Navajo reservation. *Id.* at 835, 102 S.Ct. 3394. The "legal incidence" of the tax fell squarely on the construction contractors. *Id.* at 836, 844 n. 8, 102 S.Ct. 3394. But the tribe agreed to reimburse contractors for the tax. *Id.* at 835–36, 102 S.Ct. 3394. Thus, the Supreme Court recognized that "the economic burden of the asserted taxes would ultimately fall on the Tribe," *id.,* and held the tax was preempted in part because of "burdens ... imposed indirectly through a tax on a non-Indian contractor...." *Id.* at 844 n. 8, 102 S.Ct. 3394. As the dissent in *Ramah Navajo* characterized the opinion, "the Court clearly [chose] to bar the State from taxing [the private contractor] principally because the tax impose[d] an indirect economic burden on the tribal organization." *Id.* at 854, 102 S.Ct. 3394 (Rehnquist, J., dissenting).

Although the Court did not explain precisely when an indirect tax should be considered burdensome to a tribe, *Cotton Petroleum* provides us some guidance. In particular, *Cotton Petroleum*'s focus on trial court findings of fact strongly suggests that the degree of economic burden is best determined by the fact-finder. *See* 490 U.S. at 185–86, 187 n. 17, 109 S.Ct.

1698. And unlike in *Cotton Petroleum,* the district court in this matter found that New Mexico's taxation of oil and gas extractors creates a substantial economic burden on the Ute Mountain Ute.

Cotton Petroleum turned on facts found by the New Mexico state district court. 490 U.S. at 185–86, 109 S.Ct. 1698. Although the Jicarilla Apache were not a party to either the New Mexico proceedings or the Supreme Court proceedings, the trial court made several findings concerning the tribe's interests. Importantly, the trial court determined that "no economic burden [fell] on the tribe by virtue of the state taxes," and that the tribe could increase its taxes without adversely affecting its oil and gas development. *Id.* at 185, 109 S.Ct. 1698 (quotation and alteration omitted).[35] Thus, the Supreme Court concluded that any burden asserted by the Jicarilla Apache, as amicus, was "too indirect and too insubstantial to support" preemption. *Id.* at 187, 109 S.Ct. 1698.

In reaching this conclusion, the Court distinguished *Montana,* a case it summarily affirmed a year prior to *Cotton Petroleum.* 490 U.S. at 187 & n. 17, 109 S.Ct. 1698. *Montana* considered whether certain state taxes on coal extraction were preempted as applied on the Crow Tribe's reservation. Before the Ninth Circuit, Montana had argued that its taxes did "not burden Crow's economic interests because the Tribe itself does not pay the tax ... the taxes were imposed on the lessee ... and the Tribe had no duty to

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[35] These facts were uncontested before the trial court. *Cotton Petroleum v. State,* 106 N.M. 517, 745 P.2d 1170, 1172 (N.M.Ct.App.1987)

reimburse." *Crow Tribe of Indians v. Montana,* 819 F.2d 895, 899 (9th Cir.1987). However, an economic expert explained that the state taxes adversely affected tribal coal production and marketability. *Id.* at 899–900. Seizing on these facts, the *Cotton Petroleum* Court concluded that the indirect economic burden in *Montana* was distinguishable because "the [Montana] taxes had a negative effect on the marketability of coal...." 490 U.S. at 186 n. 17, 109 S.Ct. 1698. Because the Jicarilla Apache—unlike the Crow—made no showing that the state taxes affected the marketability of their oil and gas, the Court held that *Montana* was inapplicable.

In this case, the Ute Mountain Ute have presented for our consideration facts that are more analogous to *Montana* and *Ramah Navajo.* Although the majority conducts an economic burden analysis anew, it is not our office to do so. One must keep in mind that the district court conducted a trial, heard expert testimony, and rendered detailed factual findings, which are now uncontested. As in *Montana,* the tribe's economic expert testified that the state taxes affect the production and marketability of tribal oil and gas leases. In its findings, the district court concluded that oil and gas production on Ute Mountain Ute lands would be "more attractive" to producers without the taxes and the New Mexico taxes "impose an economic burden on the [tribe] and its members."

Further, as in *Ramah Navajo,* although the legal incidence of the tax falls on the oil and gas companies, the Ute Mountain Ute lose revenue because they cannot impose the same taxes. The Ute Mountain Ute passed a resolution stating that if the New Mexico taxes were struck down, the tribe would

replace them with tribal taxes. Thus, just like the contract provision in *Ramah Navajo,* the resolution ensures that any revenue collected by New Mexico is revenue the tribe loses. A Ute Mountain Ute tribal tax in the amount equal to the New Mexico taxes would provide an additional $650 per tribal member—no small sum for a tribe whose yearly per capita income is a scant $8,159.[36]

But the majority concludes that the effect of the taxes is "too indirect and too insubstantial" to be considered in the preemption analysis. (Majority Op. 1198.) In spite of its reassurance that indirect economic burden may, under other unidentified facts, support a holding of preemption (Majority Op. 1196 n. 29), 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. The expert testimony proffered by the tribe and adopted by the district court is sufficient to distinguish this case from *Cotton Petroleum* and support the conclusion that the New Mexico taxes create a substantial economic burden on the Ute Mountain Ute Tribe.

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[36] Although true that no legal barrier prevents the tribe from imposing a tax equal to that imposed by the state and collecting revenue, *see Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), the district court found that state taxes create an economic barrier to the tribe's ability to raise revenue. The trial court's findings in *Cotton Petroleum* were precisely the opposite. 490 U.S. at 171–72, 109 S.Ct. 1698 (trial court "found that the state taxes had not affected the Tribe's ability ... to impose a higher tax").

III

I also disagree with my colleagues' treatment of the fourth *Cotton Petroleum* factor: the state's interest in taxation of on-reservation oil and gas extraction. *Cotton Petroleum* was "not a case in which the State [had] nothing to do with the on-reservation activity, save tax it." 490 U.S. at 186, 109 S.Ct. 1698. But this *is* such a case. In light of the absence of state services utilized by the tribe and on-reservation contractors, this factor strongly supports preemption.

In *Cotton Petroleum,* the trial court concluded that New Mexico provided "substantial services to both the Jicarilla Tribe and Cotton" approximating $3 million per year. *Id.* at 185, 109 S.Ct. 1698. Indeed, New Mexico "spen[t] as much per capita on members of the Tribe" as it did on non-members. *Id.* at 171 n. 7, 109 S.Ct. 1698. Moreover, Cotton Petroleum Corp. conceded that it benefitted substantially from New Mexico's services and admitted to receiving $89,384 to assist its operations. *Id.* at 185, 109 S.Ct. 1698. Distinguishing *Ramah Navajo,* the Court determined that these "substantial services," provided to both the tribe and the company on the reservation, supported New Mexico's contention that the taxes were not preempted. *Id.*

Ramah Navajo explicitly considered the effect of state services provided to a contractor off-reservation. 458 U.S. at 844, 102 S.Ct. 3394. *See also Cent. Mach. Co. v. Ariz. State Tax Comm'n,* 448 U.S. 160, 169–70, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980) (Stewart, J., dissenting) (scolding the Court for ignoring the state's provision of off-reservation services). The Court roundly rejected the suggestion that off-reservation services could justify a tax whose "burden

falls on the tribal organization." *Ramah,* 458 U.S. at 844, 102 S.Ct. 3394.

Although the majority recognizes the salient distinction between on- and off-reservation services, my colleagues read *Ramah Navajo* as suggesting that this factor matters only if the burden of the tax falls on the tribe. (Majority Op. 1201.) As discussed *supra,* the burden of the taxes in this case *does* fall on the Ute Mountain Ute, albeit indirectly. *Ramah Navajo* does not support the majority's conclusion even under the majority's reasoning. Immediately following the sentence upon which the majority relies, the Court stated: "although the state may confer substantial benefits on [the contractor] as a state contractor, we fail to see how these benefits can justify a tax imposed on the construction of school facilities *on tribal lands.*" 458 U.S. at 844, 102 S.Ct. 3394. This statement is consonant with the Court's conclusion in *White Mountain Apache* that "though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." 448 U.S. 136, 151, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

According to the district court, New Mexico "provides substantial services by regulating the off-reservation infrastructure that makes transport of oil and gas possible." Such provisions fall squarely outside the scope of our analysis as delimited by *Ramah Navajo* and *Cotton Petroleum.* Neither case considered off-reservation services provided by the state to the company to be a significant part of the preemption analysis. And this distinction makes perfect sense. New Mexico may tax oil and gas companies for their activities off the reservation to compensate for services the state provides generally.

As the *Ramah Navajo* Court stated, "[p]resumably, the state tax revenues derived from [the contractor's] off-reservation business activities are adequate to reimburse the State for the services it provides...." 458 U.S. at 844 n. 9, 102 S.Ct. 3394. Thus, New Mexico may receive its due compensation without interfering with the Ute Mountain Ute economy.

Because New Mexico provides no on-reservation services[37] to the Ute Mountain Ute or to oil and gas companies, the state's interest in taxation is minimal.

IV

I cannot agree with the majority's conclusion that the economic effect of the challenged taxes on the Ute Mountain Ute is "too indirect and too insubstantial." Nor can I agree that New Mexico's provision of off-reservation services may be used to justify taxation of on-reservation activities. Because of the extensive (if not exclusive) federal regulation of tribal oil and gas extraction, the economic burden borne by the Ute Mountain Ute, and New Mexico's de minimis interest in collecting the taxes at issue, the district court should be affirmed. I respectfully **DISSENT.**

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[37] The state also points to the fact that it offers companies and the tribe many of the services provided to off-reservation oil and gas extractors, such as use of its dispute resolution forum. But because the federal government and the tribe perform these services, there is no need for New Mexico to provide them. Quite to the contrary, the Ute Mountain Ute have rejected such services. Mere proffer of assistance to a tribe does not create a state interest in taxing on-reservation activities.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 09-2276

UTE MOUNTAIN UTE TRIBE, PLAINTIFF-APPELLEE,

v.

DOROTHY RODRIGUEZ, SECRETARY, TAXATION AND REVENUE DEPARTMENT FOR THE STATE OF NEW MEXICO, DEFENDANT-APPELLANT.

[Filed: Sept. 12, 2011]

ORDER

Before: BRISCOE, Chief Judge, LUCERO, and HOLMES, Circuit Judges.

Appellee's petition for rehearing is denied.

The Petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is denied.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. CIV- 07-772 JP/WDS.

UTE MOUNTAIN UTE TRIBE, PLAINTIFF,

v.

RICK HOMANS, SECRETARY, TAXATION AND REVENUE DEPARTMENT FOR THE STATE OF NEW MEXICO, DEFENDANT.

[Filed: Oct. 2, 2009]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OPINION

JAMES A. PARKER, Senior District Judge.

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) (Weeminuche 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, 93 S.Ct. 68, 34 L.Ed.2d 70 (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.

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, 109 S.Ct. 1698, 104 L.Ed.2d 209 (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, 102 S.Ct. 894, 71 L.Ed.2d 21 (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, 105 S.Ct. 2399, 85 L.Ed.2d 753 (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, 8 L.Ed. 483 (1832) (Marshall, J.); *see also The Kansas Indians,* 72 U.S. 737, 5 Wall. 737, 18 L.Ed. 667 (1867) (state has no power to tax Indian lands); *The New York Indians,* 72 U.S. 761, 5 Wall. 761, 18 L.Ed. 708 (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, 79 S.Ct. 269, 3 L.Ed.2d 251 (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, 79 S.Ct. 269.

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, 93 S.Ct. 1257. 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, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983)(describing the three traditional approaches to federal-state preemption analysis) *with White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (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, 93 S.Ct. 1257. 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, 93 S.Ct. 1257. Although federal law neither expressly allowed nor prohibited Arizona's taxation, when that

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[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.

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, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965) (preemptive effect of federal regulation of Indian traders on state tax).

Similarly, in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (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, 100 S.Ct. 2578. Tribal timber operations as a whole "accounted for over 90% of the Tribe's total annual profits." *Id.* at 138, 100 S.Ct. 2578. 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, 100 S.Ct. 2578. Because its activities were limited to the reservation, the company challenged the State of Arizona's imposition of its motor carrier license tax and its excise fuel tax on the company. *Id.* at 140, 100 S.Ct. 2578. 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,

100 S.Ct. 2578. 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, 100 S.Ct. 2578. 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, 100 S.Ct. 2578 (citing *McClanahan,* 411 U.S. at 172, 93 S.Ct. 1257).

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, 100 S.Ct. 2578, 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, 100 S.Ct. 2578, 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, 100 S.Ct. 2578. As a result, the balance of interests favored preemption of Arizona's taxes. *Id.* at 152, 100 S.Ct. 2578. 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, 100 S.Ct. 2578. 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, 100 S.Ct. 2578; *id.* at 159, 100 S.Ct. 2578 (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, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (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, 102 S.Ct. 3394. Thus, the tax imposed an indirect burden on the board. *Id.* at 836, 102 S.Ct. 3394. As in *Bracker,* "[f]ederal regulation of the construction and financing of Indian educational institutions [wa]s both comprehensive and pervasive." *Id.* at 839, 102 S.Ct. 3394. 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, 102 S.Ct. 3394. 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, 102 S.Ct. 3394. 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, 102 S.Ct. 3394. 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, 102 S.Ct. 3394. 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, 102 S.Ct. 3394.

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, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (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, 100 S.Ct. 2069. 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, 100 S.Ct. 2069. Thus, the taxes did not "infringe the right of reservation Indians to 'make their own laws and be ruled by them'." *Id.* at 156, 100 S.Ct. 2069 (quoting *Williams v. Lee,* 358 U.S. at 220, 79 S.Ct. 269). 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, 100 S.Ct. 2069.

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, 103 S.Ct. 2378, 76 L.Ed.2d 611 (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, 103 S.Ct. 2378. 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, 103 S.Ct. 2378. 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, 103 S.Ct. 2378. 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, 103 S.Ct. 2378. 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,* 447 U.S. at 154–59, 100 S.Ct. 2069). "The Tribal enterprise in this case clearly involve[d] 'value generated on the reservation by activities involving

the Tribe'." *Id.* (quoting *Colville,* 447 U.S. at 156–57, 100 S.Ct. 2069).

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, 103 S.Ct. 2378 (quoting *Bracker,* 448 U.S. at 148, 100 S.Ct. 2578). 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, 103 S.Ct. 2378 (citing *Puyallup Tribe v. Wash. Game Dept.,* 433 U.S. 165, 174, 97 S.Ct. 2616, 53 L.Ed.2d 667 (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, 103 S.Ct. 2378. 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, 103 S.Ct. 2378.

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, 126 S.Ct. 676, 163 L.Ed.2d 429 (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, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995). The legal incidence does not necessarily fall

on the entity bearing the economic burden of the tax, *id.* at 459–60, 115 S.Ct. 2214; 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, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985) (per curiam). Second, a court must determine where the "taxable event" occurs. *Wagnon,* 546 U.S. at 107, 126 S.Ct. 676. 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, 115 S.Ct. 2214. 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, 126 S.Ct. 676. 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]

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[2] In *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (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

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 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,* 13 Utah 454, 45 P. 348 (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, 57 S.Ct. 132, 81 L.Ed. 95 (1936). In 1924, Congress authorized the Secretary of Interior, with approval from the appropriate tribal council, to auction mineral leases

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became due at the time of severance. *Id.* at 156 n. 22, 102 S.Ct. 894.

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, 57 S.Ct. 132. 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, 57 S.Ct. 132. 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, 57 S.Ct. 132. As a result, the Supreme Court held that

the lease was subject to Montana's taxes. *Id.* at 166, 57 S.Ct. 132.

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, 105 S.Ct. 2399, 85 L.Ed.2d 753 (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, 105 S.Ct. 2399. 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, 105 S.Ct. 2399. Montana argued that the 1924 Act remained in force and authorized the taxes, even on leases executed under the IMLA. *Id.* at 765, 105 S.Ct. 2399. 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, 105 S.Ct. 2399.

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, 105

S.Ct. 2399.[3FN3] "[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, 105 S.Ct. 2399. 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, 105 S.Ct. 2399. Furthermore, "even applying ordinary principles of statutory construction," the taxation provision of the 1924 Act explicitly applied 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

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[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.

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, 102 S.Ct. 894, 71 L.Ed.2d 21 (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, 102 S.Ct. 894. 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, 102 S.Ct. 894. The Supreme Court also rejected the State's position that the taxes violated the dormant Commerce Clause. *Id.* at 153–58, 102 S.Ct. 894. 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, 102 S.Ct. 894. 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, 109 S.Ct. 1698, 104 L.Ed.2d 209 (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, 109 S.Ct. 1698. 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, 109 S.Ct. 1698.

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, 109 S.Ct. 1698.

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, 109 S.Ct. 1698. 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, 109 S.Ct. 1698. 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, 109 S.Ct. 1698; *see also Bracker,* 448 U.S. at 145 n. 12, 100 S.Ct. 2578 (reviewing history of Indian timber rights); *Ramah,* 458 U.S. at 839–40, 102 S.Ct. 3394 (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, 109 S.Ct. 1698. "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, 109 S.Ct. 1698.

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, 109 S.Ct. 1698. 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, 109 S.Ct. 1698. 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, 109 S.Ct. 1698. 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

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[4] Peculiarly, the United States Supreme Court stated that its decision in *Blackfeet Tribe* was not to the contrary. *Id.* at 183 n. 14, 102 S.Ct. 894. 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, 105 S.Ct. 2399. The distinction matters here.

208, 109 S.Ct. 1698 (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, 109 S.Ct. 1698 (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, 109 S.Ct. 1698. Finally, in another section not relevant to the issues here, the Supreme Court rejected the lessee's multiple taxation claim. *Id.* at 187–93, 102 S.Ct. 3394.

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. 3465, 3466. 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, 109 S.Ct. 1698 (quoting *Colville,* 447 U.S. at 155, 100 S.Ct. 2069). 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

[5] It should be noted that the Supreme Court of the United States upheld a similar Arizona tax, but on the basis that

states that the burden in that case was *"too* indirect and *too* insubstantial." *Cotton Petroleum,* 490 U.S. at 187, 109 S.Ct. 1698 (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 Petroleum,* 490 U.S. at 187, 109 S.Ct. 1698. 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, 109 S.Ct. 1698; 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, 109 S.Ct. 1698. 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, 100 S.Ct. 2578. If this

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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, 119 S.Ct. 957, 143 L.Ed.2d 27 (1999). That is not the situation here.

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.*

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, 118 S.Ct. 1650, 140 L.Ed.2d 898 (1998), a case discussing *Cotton Petroleum,* certain introductory language supports a broad construction. *Id.* at 710, 118 S.Ct. 1650 (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, 118 S.Ct. 1650. 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, 118 S.Ct. 1650 ("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 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

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[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.

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, 105 S.Ct. 2399.

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.[7FN7] 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 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.

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[7] *Compare Cotton Petroleum,* 490 U.S. at 182, 109 S.Ct. 1698 ("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, 100 S.Ct. 2578 (shifting federal policies on tribal timber sufficing to demonstrate tribal sovereignty).

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, 109 S.Ct. 1698. It was the Jicarilla Apache Tribe—which only participated as an *amicus*—that pushed the preemption theory. *See id.* at 170–71, 109 S.Ct. 1698. 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, 103 S.Ct. 2378 (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

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[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.

"authority to review BLM decisions involving oil and gas operations on 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, 96 S.Ct. 2308, 49 L.Ed.2d 1 (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, 103 S.Ct. 2378 (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, 102 S.Ct. 3394. 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, 102 S.Ct. 3394. 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, 100 S.Ct. 2578. 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.

APPENDIX D

Treaty between the United States of America and the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Ute Indians; Concluded March 2, 1868; Ratification advised with Amendment, July 25 1868; Amendment accepted August 15, September 1, 14, 24 and 25, 1868; Proclaimed November 6, 1868.

THE OFFICE OF THE PRESIDENT OF THE UNITED STATES

Articles of a treaty and agreement made and entered into at Washington City, D.C., on the second day of March, one thousand eight hundred and sixty-eight, by and between Nathaniel G. Taylor, Commissioner of Indian Affairs, Alexander C. Hunt, governor of Colorado Territory and ex-officio superintendent of Indian affairs, and Kit Carson, duly authorized to represent the United States, of the one part, and the representatives of the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah bands of Ute Indians, (whose names are hereto subscribed,) duly authorized and empowered to act for the body of the people of said bands, of the other part, witness:

ARTICLE 1

All of the provisions of the treaty concluded with the Tabeguache band of Utah Indians October seventh, one thousand eight hundred and sixty-three, as amended by the Senate of the United States and proclaimed December fourteenth, one thousand eight

hundred and sixty-four, which are not inconsistent with the provisions of this treaty, as hereinafter provided, are hereby re-affirmed and declared to be applicable and to continue in force as well to the other bands, respectively, parties to this treaty, as to the Tabeguache band of Utah Indians.

ARTICLE 2

The United States agree that the following district of country, to wit: Commencing at that point on the southern boundary-line of the Territory of Colorado where the meridian of longitude 107 degrees west from Greenwich crosses the same; running thence north with said meridian to a point fifteen miles due north of where said meridian intersects the fortieth parallel of north latitude; thence due west to the western boundary-line of said Territory; thence south with said western boundary-line of said Territory to the southern boundary-line of said Territory; thence east with said southern boundary-line to the place of beginning, shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article, except as herein otherwise provided.

ARTICLE 3

It is further agreed by the Indians, parties hereto, that henceforth they will and do hereby relinquish all claims and rights in and to any portion of the United States or Territories, except such as are embraced in the limits defined in the preceding article.

ARTICLE 4

The United States agree to establish two agencies on the reservation provided for in article two, one for the Grand River, Yampa, and Uintah bands, on White River, and the other for the Tabeguache, Muache, Weeminuche, and Capote bands, on the Rio de los Pinos, on the reservation, and at its own proper expense to construct at each of said agencies a warehouse, or store-room, for the use of the agent in storing goods belonging to the Indians, to cost not exceeding fifteen hundred dollars; an agency-building for the residence of the agent, to cost not exceeding three thousand dollars; and four other buildings for a carpenter, farmer, blacksmith, and miller, each to cost not exceeding two thousand dollars; also a school-house or mission-building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding five thousand dollars.

The United States agree, further, to cause to be erected on said reservation, and near to each agency herein authorized, respectively, a good water-power sawmill, with a grist-mill and a shingle-machine attached, the same to cost not exceeding eight thousand dollars each: Provided, The same shall not be erected until such time as the Secretary of the Interior may think it necessary to the wants of the Indians.

ARTICLE 5

The United States agree that the agents for said Indians, in the future, shall make their homes at the agency-buildings; that they shall reside among the Indians, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians, as may be presented for investigation under the provisions of their treaty-stipulations, as also for the faithful discharge of other duties enjoined on them by law. In all cases of depredation on person or property they shall cause the evidence to be taken in writing and forwarded, together with their finding, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

ARTICLE 6

If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one; white, black, or Indian, subject to the authority of the United States and at peace therewith, the tribes herein named solemnly agree that they will, on proof made to their agent and notice to him, deliver up the wrongdoer to the United

States, to be tried and punished according to its laws, and in case they willfully refuse so to do, the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States.

ARTICLE 7

If any individual belonging to said tribe of Indians or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, by metes and bounds, a tract of land within said reservation not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the land-book, as herein directed, shall cease to be held in common, but the same may be occupied and held in exclusive possession of the person selecting it and his family so long as he or they may continue to cultivate it. Any person over eighteen years of age, not being the head of a family may, in like manner, select and cause to be certified to him or her for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it, by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection,

which said book shall be known as the "Ute Land-Book."

The President may at any time order a survey of the reservation; and when so surveyed Congress shall provide for protecting the rights of such Indian settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property, and on all subjects connected with the government of the Indians on said reservation and the internal police thereof as may be thought proper.

ARTICLE 8

In order to insure the civilization of the bands entering into this treaty, the necessity of education is admitted, especially by such of them as are or may be engaged in either pastoral, agricultural, or other peaceful pursuits of civilized life on said reservation, and they therefore pledge themselves to induce their children, male and female, between the age(s) of seven and eighteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is complied with to the greatest possible extent; and the United States agree that for every thirty children between said ages who can be induced to attend school a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as teacher, the provisions of this article to continue for not less than twenty years.

ARTICLE 9

When the head of a family or lodge shall have selected lands, and received his certificate as above described, and the agent shall be satisfied that he intends, in good faith, to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid, not exceeding in value fifty dollars; and it is further stipulated that such persons as commence farming shall receive instructions from the farmer herein provided for; and it is further stipulated that an additional blacksmith to the one provided for in the treaty of October seventh, one thousand eight hundred and sixty-three, referred to in article one of this treaty, shall be provided with such iron, steel, and other material as may be needed for the Uintah, Yampa, and Grand River agency.

ARTICLE 10

At any time after ten years from the making of this treaty, the United States shall have the privilege of withdrawing the farmers, blacksmiths, carpenters, and millers herein, and in the treaty of October seventh, one thousand eight hundred and sixty-three, referred to in article one of this treaty, provided for, but in case of such withdrawal, an additional sum thereafter of ten thousand dollars per annum shall be devoted to the education of said Indians, and the Commissioner of Indian Affairs shall, upon careful inquiry into their condition, make such rules and regulations, subject to the approval of the Secretary

of the Interior, for the expenditure of said sum as will best promote the educational and moral improvement of said Indians.

ARTICLE 11

That a sum, sufficient in the discretion of Congress, for the absolute wants of said Indians, but not to exceed thirty thousand dollars per annum, for thirty years, shall be expended, under the direction of the Secretary of the Interior for clothing, blankets, and such other articles of utility as he may think proper and necessary upon full official reports of the condition and wants of said Indians.

ARTICLE 12

That an additional sum sufficient, in the discretion of Congress, (but not to exceed thirty thousand dollars per annum) to supply the wants of said Indians for food, shall be annually expended under the direction of the Secretary of the Interior, in supplying said Indians with beef, mutton, wheat, flour, beans, and potatoes, until such time as said Indians shall be found to be capable of sustaining themselves.

ARTICLE 13

That for the purpose of inducing said Indians to adopt habits of civilized life and become self-sustaining, the sum of forty-five thousand dollars, for the first year, shall be expended, under the direction of the Secretary of the Interior, in providing each lodge or head of a family in said confederated bands with one gentle American cow, as distinguished from the ordinary Mexican or Texas breed, and five head of sheep.

ARTICLE 14

The said confederated bands agree that whensoever, in the opinion of the President of the United States, the public interest may require it, that all roads, highways, and railroads, authorized by law, shall have the right of way through the reservations herein designated.

ARTICLE 15

The United States hereby agree to furnish the Indians the teachers, carpenters, millers, farmers, and blacksmiths, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE 16

No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in article seven of this treaty.

ARTICLE 17

All appropriations now made, or to be hereafter made, as well as goods and stock due these Indians under existing treaties, shall apply as if this treaty had not been made, and be divided proportionately among the seven bands named in this treaty, as also

shall all annuities and allowances hereafter to be made: Provided, That if any chief of either of the confederated bands make war against the people of the United States, or in any manner violate this treaty in any essential part, said chief shall forfeit his position as chief and all rights to any of the benefits of this treaty: But provided further, Any Indian of either of these confederated bands who shall remain at peace, and abide by the terms of this treaty in all its essentials, shall be entitled to its benefits and provisions, notwithstanding his particular chief and band may have forfeited their rights thereto.

[Signatures Omitted]

APPENDIX E

UNITED STATE STATUTES AT LARGE

53RD CONGRESS - 3RD SESSION

Convening December 3, 1894

AN ACT

To disapprove the treaty heretofore made with the Southern Ute Indians to be removed to the Territory of Utah, and providing for settling them down in severalty where they may so elect and are qualified, and to settle all those not electing to take lands in severalty on the west forty miles of present reservation and in portions of New Mexico, and for other purposes, and to carry out the provisions of the treaty with said Indians June fifteenth, eighteen hundred and eighty.

February 20, 1985

APPENDIX F

Portions of the INDIAN MINERAL LEASING ACT

25 U.S.C. §§ 396a-396g

§ 396a. Leases of unalloted lands for mining purposes; duration of leases

Hereafter [on and after May 11, 1938] unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act, may, with the approval of the Secretary of the Interior, be leased for mining purposes by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

§ 396d. Rules and regulations governing operations; limitations on oil and gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of this Act shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

§ 396e. Officials authorized to approve leases

The Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

§ 396g. Subsurface storage of oil or gas

The Secretary of the Interior, to avoid waste or to promote the conservation of natural resources or the welfare of the Indians, is hereby authorized in his discretion to approve leases of lands that are subject to lease under section 1 of this Act [25 U.S.C. § 396a] or the Act of March 3, 1909 (35 Stat. 783, 25 U.S.C. 396), for the subsurface storage of oil and gas, irrespective of the lands from which initially produced, and the Secretary is hereby authorized, in order to provide for the subsurface storage of oil or gas, to approve modifications, amendments, or extensions of the oil and gas or other mining lease(s), if any, in effect as to restricted Indian lands, tribal or allotted, and may promulgate rules and regulations consistent with such leases, modifications, amendments, and extensions, relating to the storage of oil or gas thereunder. Any such leases may provide for the payment of a storage fee or rental on such stored oil or gas or, in lieu of such fee or rental, for royalty other than that prescribed in the lease when such stored oil or gas is produced in conjunction with oil or gas not previously produced. It may be provided that any oil and gas lease under which storage of oil or gas is so authorized shall be continued in effect at least for the period of such storage use and so long thereafter as oil or gas not previously produced is produced in paying quantities.

APPENDIX G

Portions of the INDIAN MINERAL DEVELOPMENT ACT

25 U.S.C. §§ 2101-2108

§ 2102. Minerals Agreement

(a) Authorization for tribes; approval by Secretary. Any Indian tribe, subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter, may enter into any joint venture, operating, production, sharing, service, managerial, lease or other agreement, or any amendment, supplement or other modification of such agreement (hereinafter referred to as "Minerals Agreement") providing for the exploration for, or extraction, processing, or other development of, oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources (hereinafter referred to as "mineral resources") in which such Indian tribe owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such mineral resources

(b) Inclusion of individual holdings; approval by parties and Secretary. Any Indian owning a beneficial or restricted interest in mineral resources may include such resources in a tribal Minerals Agreement subject to the concurrence of the parties and a finding by the Secretary that such participation is in the best interest of the Indian.

§ 2103. Secretary's determination on Minerals Agreement.

(a) Time; enforcement. The Secretary shall approve or disapprove any Minerals Agreement submitted to him for approval within (1) one hundred and eighty days after submission or (2) sixty days after compliance, if required, with section 4332(2)(C) of Title 42 or any other requirement of Federal law, whichever is later. Any party to such an agreement may enforce the provisions of this subsection pursuant to section 1361 of Title 28.

(b) Factors for consideration; extent of required study. In approving or disapproving a Minerals Agreement, the Secretary shall determine if it is in the best interest of the Indian tribe or of any individual Indian who may be party to such agreement and shall consider, among other things, the potential economic return to the tribe; the potential environmental, social, and cultural effects on the tribe; and provisions for resolving disputes that may arise between the parties to the agreement: *Provided*, That the Secretary shall not be required to prepare any study regarding environmental, socioeconomic, or cultural effects of the implementation of a Minerals Agreement apart from that which may be required under section 4332(2)(C) of Title 42.

(c) Prior notice of proposed finding; privileged information. Not later than thirty days prior to formal approval or disapproval of any Minerals Agreement, the Secretary shall provide written findings forming the basis of his intent to approve or disapprove such agreement to the affected Indian tribe. Notwithstanding any other law, such findings and all projections, studies, data or other information

possessed by the Department of the Interior regarding the terms and conditions of the Minerals Agreement, the financial return to the Indian parties thereto, or the extent, nature, value or disposition of the Indian mineral resources, or the production, products or proceeds thereof, shall be held by the Department of the Interior as privileged proprietary information of the affected Indian or Indian tribe.

(d) Delegation; final action; appeal; burden on Secretary. The authority to disapprove agreements under this section may only be delegated to the Assistant Secretary of the Interior for Indian Affairs. The decision of the Secretary or, where authority is delegated, of the Assistant Secretary of the Interior for Indian Affairs, to disapprove a Minerals Agreement shall be deemed a final agency action. The district courts of the United States shall have jurisdiction to review the Secretary's disapproval action and shall determine the matter de novo. The burden is on the Secretary to sustain his action.

(e) Nonliability of United States; continuing obligations. Where the Secretary has approved a Minerals Agreement in compliance with the provisions of this chapter and any other applicable provision of law, the United States shall not be liable for losses sustained by a tribe or individual Indian under such agreement: *Provided*, That the Secretary shall continue to have a trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any Minerals Agreement by any other party to such agreement: *Provided further*, That nothing in this chapter shall absolve the United States from any responsibility to Indians, including those which derive from the trust relationship and from any

treaties, Executive orders, or agreement between the United States and any Indian tribe.

§ 2105. Effect of other provisions

Nothing in this Act shall affect, nor shall any Minerals Agreement approved pursuant to his Act be subject to or limited by, the Act of May 11, 1938, as amended, or any other law authorizing the development or disposition of the mineral resources of an Indian or Indian Tribe.

§ 2108. Tribal right to develop mineral resources

Nothing in this Act shall impair any right of an Indian tribe organized under section 16 or 17 of the Act of June 18, 1934, as amended, to develop their mineral resources as may be provided in any constitution or charter adopted by such tribe pursuant to that Act.

APPENDIX H

25 C.F.R. Part 211 — LEASING OF TRIBAL LANDS FOR MINERAL DEVELOPMENT[1]

§ 211.1 Purpose and Scope.

(a) The regulations in this part govern leases and permits for the development of Indian tribal oil and gas, geothermal, and solid mineral resources except as provided under paragraph (e) of this section. These regulations are applicable to lands or interests in lands the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States. These regulations are intended to ensure that Indian mineral owners desiring to have their resources developed are assured that they will be developed in a manner that maximizes their best economic interests and minimizes any adverse environmental impacts or cultural impacts resulting from such development.

(b) The regulations in this part shall be subject to amendment at any time by the Secretary of the Interior. No regulation that becomes effective after the date of approval of any lease or permit shall operate to affect the duration of the lease or permit, rate of royalty, rental, or acreage unless agreed to by all parties to the lease or permit.

(c) The regulations of the Bureau of Land Management, the Office of Surface Mining Reclamation and Enforcement, and the Minerals

[1] Regulations implementing the Indian Mineral Leasing Act.

Management Service that are referenced in §§ 211.4, 211.5, and 211.6 are supplemental to the regulations in this part, and apply to parties holding leases or permits for development of Indian mineral resources unless specifically stated otherwise in this part or in such other Federal regulations.

(d) Nothing in the regulations in this part is intended to prevent Indian tribes from exercising their lawful governmental authority to regulate the conduct of persons, businesses, operations or mining within their territorial jurisdiction.

(e) The regulations in this part do not apply to leasing and development governed by regulations in 25 CFR Parts 213 (Members of the Five Civilized Tribes of Oklahoma), 226 (Osage), or 227 (Wind River Reservation).

§ 211.28 Unitization and communitization agreements, and well spacing.

(a) For the purpose of promoting conservation and efficient utilization of minerals, the Secretary may approve a cooperative unit, drilling or other development plan on any leased area upon a determination that approval is advisable and in the best interest of the Indian mineral owner. For the purposes of this section, a cooperative unit, drilling or other development plan means an agreement for the development or operation of a specifically designated area as a single unit without regard to separate ownership of the land included in the agreement. Such cooperative agreements include, but are not limited to, unit agreements, communitization agreements and other types of agreements that allocate costs and benefits.

(b) The consent of the Indian mineral owner to such unit or cooperative agreement shall not be required unless such consent is specifically required in the lease. However, the Secretary shall consult with the Indian mineral owner prior to making a determination concerning a cooperative agreement or well spacing plan.

(c) Requests for approval of cooperative agreements which comply with the requirements of all applicable rules and regulations shall be filed with the superintendent or area director.

(d) All Indian mineral owners of any right, title or interest in the mineral resources to be included in a cooperative agreement must be notified by the lessee at the time the agreement is submitted to the superintendent or area director. An affidavit from the lessee stating that a notice was mailed to each mineral owner of record for whom the superintendent or area director has an address will satisfy this notice requirement.

(e) A request for approval of a proposed cooperative agreement, and all documents incident to such agreement, must be filed with the superintendent or area director at least ninety (90) days prior to the first expiration date of any of the Indian leases in the area proposed to be covered by the cooperative agreement.

(f) Unless otherwise provided in the cooperative agreement, approval of the agreement commits each lease to the unit in the area covered by the agreement on the date approved by the Secretary or the date of first production, whichever is earlier, as long as the agreement is approved before the lease expiration date.

(g) Any lease committed in part to any such cooperative agreement shall be segregated into a separate lease or leases as to the lands committed and lands not committed to the agreement. Segregation shall be effective on the date the agreement is effective.

(h) Wells shall be drilled in conformity with a well spacing program approved by the authorized officer.

§ 211.46 Inspection of premises, books, and accounts.

Lessees shall allow the Indian mineral owner, the Indian mineral owner's representatives, or any authorized representative of the Secretary to enter all parts of the leased premises for the purpose of inspection and audit. Lessees shall keep a full and correct account of all operations and submit all related reports required by the lease and applicable regulations. Books and records shall be available for inspection during regular business hours.

§ 211.47 Diligence, drainage and prevention of waste.

The lessee shall:

(a) Exercise diligence in mining, drilling and operating wells on the leased lands while minerals production can be secured in paying quantities;

(b) Protect the lease from drainage (if oil and gas or geothermal resources are being drained from the lease premises by a well or wells located on lands not included in the lease, the Secretary reserves the right to impose reasonable and equitable terms and conditions to protect the interest of the Indian mineral owner of the lands, such as payment of compensatory royalty for the drainage);

(c) Carry on operations in a good and workmanlike manner in accordance with approved methods and practices;

(d) Have due regard for the prevention of waste of oil or gas or other minerals, the entrance of water through wells drilled by the lessee to other strata, to the destruction or injury of the oil or gas, other mineral deposits, or fresh water aquifers, the preservation and conservation of the property for future productive operations, and the health and safety of workmen and employees;

(e) Securely plug all wells and effectively shut off all water from the oil or gas-bearing strata before abandoning them;

(f) Not construct any well pad location within 200 feet of any structures or improvements without the Indian surface owner's written consent;

(g) Carry out, at the lessee's expense, all reasonable orders and requirements of the authorized officer relative to prevention of waste;

(h) Bury all pipelines crossing tillable lands below plow depth unless other arrangements are made with the Indian surface owner; and

(i) Pay the Indian surface owner all damages, including damages to crops, buildings, and other improvements of the Indian surface owner occasioned by the lessee's operations as determined by the superintendent.

§ 211.48 Permission to start operations.

(a) No exploration, drilling, or mining operations are permitted on any Indian lands before the Secretary has granted written approval of a mineral

lease or permit pursuant to the regulations in this part.

(b) After a lease or permit is approved, written permission must be secured from the Secretary before any operations are started on the leased premises, in accordance with applicable rules and regulations in 25 CFR part 216; 30 CFR chapter II, subchapters A and C; 30 CFR part 750 (Requirements for Surface Coal Mining and Reclamation Operations on Indian Lands), 43 CFR parts 3160, 3260, 3480, 3590, and Orders or Notices to Lessees (NTLs) issued thereunder.

§ 211.49 Restrictions on operations.

Leases issued under the provisions of the regulations in this part shall be subject to such restrictions as to time or times for well operations and production from any leased premises as the Secretary judges may be necessary or proper for the protection of the natural resources of the leased land and in the interest of the lessor.

APPENDIX I

25 C.F.R. Part 225 — OIL AND GAS, GEOTHERMAL, AND SOLID MINERAL AGREEMENTS[1]

§ 225.1 Purpose and Scope.

(a) The regulations in this part, administered by the Bureau of Indian Affairs under the direction of the Secretary of the Interior, govern minerals agreements for the development of Indian-owned minerals entered into pursuant to the Indian Mineral Development Act of 1982, 25 U.S.C. 2101-2108 (IMDA). These regulations are applicable to the lands or interests in lands of any Indian tribe, individual Indian or Alaska native the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States. These regulations are intended to ensure that Indian mineral owners are permitted to enter into minerals agreements that will allow the Indian mineral owners to have more responsibility in overseeing and greater flexibility in disposing of their mineral resources, and to allow development in the manner which the Indian mineral owners believe will maximize their best economic interest and minimize any adverse environmental or cultural impact resulting from such development. Pursuant to section 4 of the IMDA (25 U.S.C. 2103(e)), as part of this greater flexibility, where the Secretary has approved

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[1] Regulations implementing the Indian Mineral Development Act.

a minerals agreement in compliance with the provisions of 25 U.S.C. chap. 23 and any other applicable provision of law, the United States shall not be liable for losses sustained by a tribe or individual Indian under such minerals agreement. However, as further stated in the IMDA, the Secretary continues to have a trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any minerals agreement, and to uphold the duties of the United States as derived from the trust relationship and from any treaties, executive orders, or agreements between the United States and any Indian tribe.

(b) The regulations in this part shall become effective and in full force on April 29, 1994, and shall be subject to amendment at any time by the Secretary; Provided, that no such regulation that becomes effective after the date of approval of any minerals agreement shall operate to affect the duration of the minerals agreement, the rate of royalty or financial consideration, rental, or acreage unless agreed to by all parties to the minerals agreement.

(c) The regulations of the Bureau of Land Management, the Office of Surface Mining Reclamation and Enforcement, and the Minerals Management Service that are referenced in §§ 225.4, 225.5, and 225.6 are supplemental to these regulations, and apply to minerals agreements for development of Indian mineral resources unless specifically stated otherwise in this part or in other Federal regulations. To the extent the parties to a minerals agreement are able to provide reasonable provisions satisfactorily addressing the issues of

valuation, method of payment, accounting, and auditing, governed by the Minerals Management Service regulations, the Secretary may approve alternate provisions in a minerals agreement.

(d) Nothing in these regulations is intended to prevent Indian tribes from exercising their lawful governmental authority to regulate the conduct of persons, businesses, or minerals operations within their territorial jurisdiction

§ 225.32 Permission to start operations.

(a) No exploration, drilling, or mining operations are permitted on any Indian lands before the Secretary has granted written approval of the minerals agreement pursuant to the regulations. After a minerals agreement is approved, written permission to start operations must be secured by applying for the permits referred to in paragraph (b) of this section.

(b) Applicable permits in accordance with rules and regulations in 30 CFR part 750, 43 CFR parts 3160, 3260, 3480, 3590, and Orders or Notices to Lessees (NTL) issued thereunder shall be required before actual operations are conducted on the minerals agreement acreage.

§ 225.35 Inspection of premises; books and accounts.

(a) Operators shall allow Indian mineral owners, their authorized representatives, or any authorized representatives of the Secretary to enter all parts of the minerals agreement area for the purpose of inspection. Operators shall keep a full and correct account of all operations and submit all related reports required by the minerals agreement and

applicable regulations. Books and records shall be available for inspection during regular business hours.

(b) Operators shall provide records to the Minerals Management Service (MMS) in accordance with MMS regulations and guidelines. All records pertaining to a minerals agreement shall be maintained by an operator in accordance with 30 CFR part 212.

(c) Operators shall provide records to the Authorized Officer in accordance with BLM regulations and guidelines.

(d) Operators shall provide records to the Director's Representative in accordance with OSMRE regulations and guidelines.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 09-2276

UTE MOUNTAIN UTE TRIBE, PLAINTIFF-APPELLEE,

v.

DOROTHY RODRIGUEZ, SECRETARY, TAXATION AND REVENUE DEPARTMENT FOR THE STATE OF NEW MEXICO, DEFENDANT-APPELLANT.

RESPONSE BRIEF OF APPELLEE UTE MOUNTAIN UTE TRIBE

Issues Presented

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

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[1] In identifying these three issues, the Tribe notes that Homans has already agreed to the District Court's 311 findings of fact (Opening Br. 20) and recognizes the applicability of the "particularized inquiry" preemption analysis developed in Cotton Petroleum 493 U.S. 163 and its predecessors White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); and

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

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

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

Statement of the Case

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

Statement of Facts

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

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Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982). (Opening Br. 34, n. 5 (stating, "Thus, [Homans] did not (and does not) take the position that the Bracker interest-balancing test is inapplicable.")).

development. [RP 176, Findings 16-17, 19.] The State of New Mexico provides no services on the Reservation. [RP 177, 199, Findings 28, 245.]

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

Oil and gas leasing of the New Mexico Lands began in the 1950s. [RP 186, Finding 114.] Leases were originally entered into pursuant to, the Indian Mineral Leasing Act ("IMLA"), 25 U.S.C. §§ 396a-396g. [RP 185-186, Finding 113.] Currently most of the mineral development agreements the Tribe negotiates and enters into are mineral development agreements pursuant to the Indian Mineral Development Act of 1982 ("IMDA"), 25 U.S.C. § 2101 et seq. [RP 186, Finding 115.] These agreements expand the Tribe's opportunity to be an active participant in mineral development of its lands. [RP 186-87, Findings 119-24.] All leases and agreements require the approval of the Secretary of the Interior, whose authority has been delegated to the Bureau of Indian Affairs ("BIA"). [RP 187, Findings 125, 129-30.] Surface management, including the granting of easements and oversight of cultural resources, is the responsibility of the BIA and the Tribe. [RP 189, Findings 148-49, 155.] Under federal law (25 U.S.C. §

396d and regulations promulgated pursuant thereto) all oil and gas operations ("downhole") are supervised by the Bureau of Land Management ("BLM"), in cooperation with the BIA and the Tribe. [RP 188-89, Findings 13 8-45, 150-55.] BLM approves Applications for Permits to Drill ("APD"), oversees the disposal of produced water, protects the mechanical integrity of the wells, and oversees the abandonment and plugging of wells, among other operational activities on the Ute Mountain Ute Reservation. [RP 189-90, Findings 142, 158-65.] After BLM approves permits, it forwards the applicable form to BIA and the New Mexico Oil Conservation Division ("NMOCD"). [RP 189, Finding 157.] There is no provision in federal or tribal law for state approval of any oil and gas activities on the Ute Mountain Ute Reservation, and the District Court found to be de minimis the economic value of New Mexico's services to oil and gas operators on the New Mexico Lands. [RP 201, Finding 264.] The District Court also concluded that federal regulation of oil and gas operations on the Ute Mountain Ute Reservation is exclusive. [RP 228.]

There are 186 active wells on the New Mexico Lands, out of 23,000 active oil and gas wells in the New Mexico portion of the San Juan Basin, a geologic formation, and over 50,000 active wells in the entire state. [RP 181-82, 200, Findings 7 1-73, 256.] NMOCD is responsible for the regulation of oil and gas operations in the State of New Mexico.[2] That

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[2] Pages 13-15 of the Statement of Facts in Homans' Opening Brief describe the mission, policies, and procedures of the NMOCD with few references to the District Court's findings. The Tribe does not dispute these descriptions, except for any inference that the legal authority of NMOCD extends to the

includes protection of the public from the adverse environmental effects of petroleum production. However, except for two citizen complaints of hydrogen sulfide ("H2S") originating from wells on the New Mexico Lands, no evidence was introduced to show that wells operated on the New Mexico Lands have caused any actual or potential adverse environmental effects, including groundwater contamination or effects on wildlife, on any lands adjoining the Ute Mountain Ute Reservation. [RP 191, Findings 171- 82.]

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

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New Mexico Lands or that NMOCD exercises concurrent jurisdiction over UMUT oil and gas operations with BLM—propositions which Homans unsuccessfully sought to prove at trial. The Tribe submits that numerous findings of fact support the District Court's conclusion that the economic value of NMOCD regulation of oil and gas operators on the New Mexico Lands is de minimis. In view of the statement in Homans' Opening Brief that Appellant does not take issue with any of the District Court's findings, the Tribe offers only a short summary of the court's findings pertaining to the role of NMOCD. (Opening Br. 20.)

the correlative rights of all parties concerned, to prevent drilling of unnecessary wells, and to promote conservation of UMUT oil and gas resources. [RP 192-93, Findings 183-91.]

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

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

Since 1992 the Tribe has barred NMOCD officials from entering the Reservation without permission. [RP 194, Finding 207.] A 2002 publication from the website of the New Mexico Department of Energy, Minerals, and Natural Resources (of which NMOCD is a part), states: "The State of New Mexico does not have jurisdiction [over energy and minerals development] on Indian reservation ... lands." [RP 285.] That publication was withdrawn from the website prior to the trial in this case, and NMOCD continues to require operators on the New Mexico Lands to fill out forms and to seek approvals for activities already approved by BLM. [RP 180-8 1, Findings 62, 64.] Under regulations promulgated on

December 1, 2008, NMOCD requires those operators to use BLM forms for permit applications and various reports, but NMOCD still requires its approval after BLM approval. [RP 180, Finding 62.] When an operator does not follow NMOCD regulations or fill out the required forms, NMOCD may revoke

> the operator's authority to transport natural gas or oil within the State of New Mexico, making it difficult for the operator to continue operations on the New Mexico Lands. [RP 180-8 1, Finding 64.]

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

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

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

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

The District Court found that these five taxes impose an economic burden on the Tribe and its members in a number of respects. [RP 206, Finding 310.] Without the New Mexico tax, oil and gas operators could seek to increase production on the New Mexico Lands by discovering new sources of oil and gas, by drilling infill wells on existing pools, or by bringing back into production wells that are not profitable under the current taxes. [RP 205, Finding 299.] The increase in production through discovery of new sources of oil and gas would increase UMUT revenue from royalties and the current taxes. [RP 205, Finding 300.] Increased production through infill or reopening closed wells on pools that lie within the New Mexico Lands would also increase UMUT revenue. [RP 205, Finding 301.] And if the Tribe were to impose the taxes which the State now imposes on Reservation oil and gas operators, as authorized by Council Resolution No. 3874 [RP 271], it would gain at least $1.3 million per year, which would increase tribal revenue from all sources ($16,052,092.00 in 2007 [RP 205, Finding 304]) by over 8 percent, or if that additional revenue were distributed per capita, the average annual income of tribal members would increase by $650.00. [RP 204, Finding 297.]

The District Court also found, "[O]ther than opening its courts to the UMUT,[5] and offering

[5] The only example of this given by the District Court is the Tribe's intervention in the San Juan River Basin general stream adjudication, New Mexico ex rel. State Engineer v. United States, Civil No. 75-184 in State District Court in San Juan County. [RP 199, Finding 246.] But the Tribe's intervention was necessitated by the Supreme Court ruling that state courts have jurisdiction to adjudicate Indian reservation water rights by

plugging of abandoned wells, New Mexico provides no services directly to the UMUT [and] [t]here is no evidence in the record that members of the UMUT make use of services provided by New Mexico ... " [RP 199, Findings 248-49.]

Summary of Arguments

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

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

In its brief, the Ute Mountain Ute Tribe will demonstrate that the District Court correctly held

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suing the United States pursuant to the McCarran Amendment, 43 U.S.C. § 666. C. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). Unless an Indian tribe intervenes to protect its own water rights, they will be adjudicated anyway, and "the right to refuse to intervene" is thus "dubious at best." Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 567 n. 17 (1983).

that the taxes are preempted because the federal regulatory scheme is comprehensive, the five New Mexico taxes economically harm the Tribe, and the State of New Mexico provides no services that would justify this taxation. New Mexico's only interest in the New Mexico Lands is a desire to raise revenue.

Argument

I. Standard of Review.

Both Homans and the Tribe accept the District Court's 311 findings of fact.

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

II. Historical Background

The Ute Mountain Ute Tribe has a long-standing relationship with the United States. The Ute Mountain Ute Tribe today consists of one band of Ute Indians, the Weeminuche Band. Since the first treaty in 1868[6] with the Confederated Utes, the

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

tribal lands were reduced to where the Tribe is today.[7] [RP 175, Finding 4.] The New Mexico Lands were set aside for the Tribe by the Act of Congress in 1895. 28 Stat. 677. [RP 175, Finding 9.] The Tribe is a "domestic dependent nation" of the United States, Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831), and as such, enjoys the powers of self-governance free from state interference, including state taxation. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 170-171 (1973). Congress has the exclusive power to regulate commerce with Indian tribes, id. at 172, and the United States Supreme Court has frequently recognized Congress' authority to protect tribal immunity from state taxation. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 473 (1976). Only in very narrow circumstances may a state tax tribal commerce, such as oil and gas development, on tribal lands.

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

III. United States Supreme Court Precedent Establishes a Flexible Preemption Analysis For

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

Determining whether States May Tax Non-Indians Developing Reservation-Created Resources

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

The Bracker Court used this "particularized inquiry" analysis to determine whether the State of Arizona could impose a motor carrier license tax and an excise fuel tax on a non-Indian company participating in the development of timber resources on the Fort Apache Reservation. Id. at 145-46. During the particularized inquiry analysis, the Bracker Court assessed the federal interest in reservation timber and roads, the White Mountain Apache Tribe's interest in making productive use of its timber, and Arizona's interest in the timber production. See id. at 145-15 1. [RP 209.] It first determined that the White Mountain Apache tribal timber development was governed by comprehensive

federal regulations. Id. at 148. [RP 209.] Next, it determined that the economic burden of the state tax on the White Mountain Apache Tribe would interfere with the federal objective of providing the tribe with the benefits of its resources. Id. at 148-50. [RP 209.] Third, it determined that Arizona provided no regulatory function or service to the White Mountain Apache Tribe. Id. at 148-49. [RP 209.] Finally, it concluded that the state had only a "generalized interest in raising revenue" from the on-reservation economic activity. Id. at 150. [RP 209.] Thus, even though the Bracker Court acknowledged that the economic burden of the Arizona taxes was relatively small, it held that the balance of the interests favored the federal preemption of Arizona's taxes. See id. at 154 (Stevens, J., dissenting). [RP209.]

Two years later, the Supreme Court expanded and clarified the Bracker particularized inquiry analysis to determine whether New Mexico could impose a gross receipts tax on a non-Indian construction company that was building a school for Indian children on reservation lands. Ramah, 458 U.S. 832. Again, the Court used the particularized inquiry analysis to balance the federal interests in promoting self-sufficiency in Indian education, the tribal interests in Indian education, and the state interests in regulating and taxing federally-funded schools. See id. at 838. [RP 210.] In Ramah, New Mexico faced a history of extensive federal regulation of Indian educational facilities and express federal policy of encouraging self-sufficiency in Indian education. Id. at 839-42. To overcome the lack of State investment in and oversight of the Navajo schools, New Mexico argued that the services it provided to the construction company off the reservation and other,

unrelated services it provided to the Navajo Nation were substantial and justified the imposition of the tax. Id. at 843-45. [RP 210.] The Ramah Court rejected both arguments, and held that, because New Mexico's only interest in the school construction was a general desire to raise revenue, the tax was preempted. Id. at 844-45 n. 9-10. [RP 210.]

Importantly for this case, in 1989 the United States Supreme Court upheld and applied the Bracker particularized inquiry analysis in the setting of New Mexico's oil and gas production taxes imposed on the Jicarilla Apache Indian Reservation. Cotton, 490 U.S. at 176 (confirming that the Supreme Court has "applied a flexible preemption analysis sensitive to the particular facts and legislation involved"). In Cotton—a Commerce Clause case brought not by a Tribe but by a producer seeking to free itself from both state and tribal taxes—the Supreme Court's examination confirmed that a traditional statutory preemption analysis alone is not appropriate without an examination of competing interests on the reservation commerce in question. See id. Presented with a particular set of facts developed by the New Mexico state courts, the Cotton Court determined that, upon balancing the competing state, tribal, and federal interests, the state taxes were not preempted on the Jicarilla Apache Reservation. See id. at 185 (stating: "The factual findings of the New Mexico District Court clearly distinguish this case from both Bracker, supra, and Ramah Navajo School Bd., supra" and applying those factual findings to the law).

These cases set out the baseline for the flexible, particularized inquiry analysis used today to determine whether states may tax non-Indians

engaging in on-reservation economic activities. In general, the first step in undertaking the particularized inquiry is to determine whether there is a comprehensive federal framework for regulation and management of the on-reservation activity and a strong history of active tribal participation within that framework. Ramah, 458 U.S. at 839-43; Bracker, 448 U.S. at 145-50; Cotton, 490 U.S. at 18 1-82 (analyzing the federal framework for Executive Order reservation oil and gas development). If so, that presence will demonstrate both strong federal and tribal interests and a strong backdrop of tribal sovereignty in the area of the taxed economic activity. See id.

Second, the state asserting its taxation jurisdiction must demonstrate a specific, legitimate regulatory interest in the reservation activity and must provide substantial services related to that activity to justify any on-reservation taxation activity. Ramah, 458 U.S. at 843-45; Bracker, 448 U.S. at 150. Importantly, in this analysis, state provision of off-reservation services does not justify on- reservation taxation. Ramah, 458 U.S. at 844 n. 9. Finally, if the only state interest in the on-reservation activity is a general desire to raise revenue, that interest will be insufficient to overcome a comprehensive federal and tribal management scheme. Ramah, 458 U.S. at 845; Bracker, 448 U.S. at 150-5 1.

This particularized inquiry analysis has been consistently affirmed by the United States Supreme Court and the federal circuit courts since 1989. See, e.g., Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 101-02 (2005) (confirming that, while taxes placed on non-Indian, on-reservation activity

can be preempted under the Bracker interest balancing test, a different test should be applied to off-reservation activity); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-43 (1983) (applying the Bracker analysis to preempt state regulation and licensing of on-reservation hunting and fishing); Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566, 58 1-82 (10th Cir. 2000) (referencing Bracker but applying the off-reservation taxation analysis).

Cotton shows how a fundamentally different set of facts on a different reservation in New Mexico can result in a different legal conclusion; it does not control the outcome of the particularized inquiry as applied to taxation of non-Indian oil and gas operators on the New Mexico Lands. Instead, the clear factual differences between this case and Cotton fully support the District Court's painstaking development of the uncontroverted findings of fact and its proper application of those facts to applicable federal law.

IV. Under the Bracker Preemption Analysis, Homans Is Pre-empted From Assessing The Five Oil and Gas Taxes.

Under the Bracker preemption analysis, there are three reasons that Homans should be preempted from assessing the five oil and gas taxes. First, there is a strong background of Ute Mountain Ute Tribal sovereignty in the area of oil and gas regulation that has been carried forward into the comprehensive and exclusive scheme of federal and tribal regulation that exists on the New Mexico Lands today. Second, the five oil and gas taxes result in economic harm to the Tribe and its impoverished members and interfere with federal interests in the Tribe's oil and gas

development. Finally, despite Homans' assertions, New Mexico does not provide the substantial services necessary to justify taxation of on-reservation activity. Thus, under the Bracker balancing test, the significant federal and tribal interests outweigh the state's de minimis on-reservation and off-reservation interests.

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

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

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

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

> In 1924 and 1927 Congress, in two separate statutes, explicitly pronounced that the production of oil and gas on Indian lands such

> as the Ute Mountain Ute tribal lands may be taxed by the state in which such lands are located. 25 U.S.C. § 398 and § 398a.

(Opening Br. 2, 46-47.) That statement is flatly wrong, and the District Court did not so hold. Indeed, if Homans is correct that Congress "explicitly" authorized New Mexico state taxation of oil and gas production on Indian lands, then there would have been no point in the Supreme Court's particularized inquiry in Cotton, as Congressional intent would have been explicit.[8]

On their face, none of the statutes cited above apply to oil and gas leases on the New Mexico Lands. The tax provision of the 1927 Act, 25 U.S.C. § 398c (discussed in Cotton), applies only to "oil and gas wells ... upon lands within Executive Order Indian reservations," which the Ute Mountain Ute Reservation is not. The 1924 Act, 25 U.S.C. § 398, is limited to 10-year mining leases on "[u]nallotted land on Indian reservations ... [under section 3 of the Act of February 28, 1891]..." The 1891 Leasing Act (25 U.S.C. § 397), referenced in the 1924 Act, applies

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

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

by its terms only to lands "occupied by Indians who have bought and paid for the same, and which are not needed for farming or agricultural purposes..." This does not include the Ute Mountain Ute Reservation.

The New Mexico Lands were set aside by an Act of Congress on February 20, 1895, as part of the Ute Mountain Ute Reservation. 28 Stat. 677. [RP 175, Finding 9.] There was no oil and gas development on the Ute Mountain Ute Reservation until the 1950s [RP 186, Finding 114], by which time the omnibus authorization of the IMLA had long been in place. As the Supreme Court held in Cotton, the IMLA neither authorized nor immunized oil and gas development on Indian lands from state taxation. Cotton, 490 U.S. at 177. But Homans argues that the Tribe "knew" when it began its oil and gas leasing program in the 1950s that state taxation was "explicitly authorized" by the 1924 Act. (Opening Br. 46-47.) For this assertion, Homans relies on British-American Oil Producing Co. v. Bd. of Equalization, 299 U.S. 159 (1936). That case involved an oil and gas lease on the Blackfeet Reservation, and the lease document itself recited that it was made pursuant to the 1891 Act. Id. at 161. Forty years later the Department of the Interior viewed the suggestion in British-American that the 1891 Act applied to all treaty reservations as dicta, noting that there was no dispute over the applicability of the 1891 Act to the pertinent oil and gas lease on the Blackfeet Reservation. 84 Interior Decisions 905, 906-08 (1977). In fact, there are no such leases on the Ute Mountain Ute Reservation, and no authority can be offered to show that the

1891 Act or the 1924 Act have any applicability to UMUT leases.[9]

In reality, Homans is making the ultimate bootstrap argument: that there is no tradition of tribal independence at the Ute Mountain Ute Reservation because the State of New Mexico began taxing oil and gas production in the 1950s. He can find no support for such taxation in applicable federal statutes. As mentioned, the IMLA did not speak to the issue. More recently, Congress has affirmatively endorsed tribal control over reservation mineral resources. In the IMDA, Congress authorized Indian Tribes to enter into joint venture and production-sharing agreements to develop their mineral resources. 25 U.S.C. § 2102(a). Tribes are thus no longer passive lessees awaiting their royalty payments. Indeed, the policy favoring tribal control is so strong that Congress placed an explicit "burden" on the Secretary of the Interior to justify any disapproval of a minerals agreement made pursuant to the IMDA. 25 U.S.C. § 2 103(d). In 1994 the BIA promulgated regulations implementing the IMDA, which were

> intended to ensure that Indian mineral owners are permitted to enter into minerals agreements that will allow the Indian mineral owners to have more responsibility in overseeing and greater flexibility in disposing of their mineral resources, and to allow development in the manner which the Indian

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

> mineral owners believe will maximize their best economic interest and minimize any adverse environmental or cultural impact resulting from such development.

25 C.F.R. § 225.1(a). Further, Section 6 of the IMDA provides that agreements made thereunder are "not subject to the [IMLA or] any other law authorizing the development or disposition of the mineral resources of an Indian or Indian tribe." 25 U.S.C. § 2105.[10]

Then in 2005 Congress enacted the Indian Tribal Energy Development and Self Determination Act of 2005 in Title V of the Energy Act, 25 U.S.C. §§ 3501-3 504. The Act promotes the integration of energy resources on Indian lands by facilitating the construction of pipelines, electrical transmission facilities, refineries, and power plants thereon. Both the Secretary of the Interior and the Secretary of Energy are authorized to conduct grant and loan programs to assist tribes in achieving energy independence. Section 503 of the Energy Act

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

specifically authorizes the making of grants to tribes "for (i) the development and enforcement of tribal laws (including regulations) relating to tribal energy resource development; and (ii) the development of technical infrastructure to protect the environment under applicable law ...." 25 U.S.C. § 3503(b)(1)(C). It is under the auspices of this broad congressional mandate that the federal agencies and the UMUT have developed a comprehensive regulatory scheme for oil and gas activities on the New Mexico Lands. It is in this spirit that the Tribe goes about developing its mineral resources, seeking true independence for its people.

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

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

As a preliminary matter, it is important to note that the federal regulations have been significantly enhanced since Cotton, which was decided in 1989. In 1994 the BIA promulgated the first set of regulations implementing the IMDA, an important new authorization of Indian mineral development that was not discussed by the Supreme Court in Cotton, 59 Fed. Reg. 14,971 (March 30, 1994); 25 C.F.R. Part 225.[11] Subsequently, in 1996 the BIA produced what it claimed were the first comprehensive regulations covering oil and gas leasing in 58 years. 61 Fed. Reg. 35634 (July 8, 1996). Further, in 2001 BLM added regulations focusing on drainage protection. 66 Fed. Reg. 1893 (January 10, 2001). Finally, on March 10, 2008, the BIA promulgated regulations in 25 C.F.R. Part 224 (73 Fed. Reg. 12,808), implementing the Indian Tribal Energy Development and Self-Determination Act of 2005. These regulations "[e]stablish procedures by which a tribe, at its discretion, may enter into and manage leases, business agreements, and rights-of-way for purposes of energy resource development on tribal land ..." 25 C.F.R. § 224.10. These new regulations continue to expand the regulatory role of the federal agencies and the Tribe, making the current regulatory regime significantly different than the regulatory regime in

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

Cotton. Accordingly, while the technical downhole instructions have largely remained in place over the past 25 years, Congress and the Department of Interior have deliberately placed in tribes ever greater authority over how oil and gas production is to be modeled.

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

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

concurrence from the BIA. [RP 188, Finding 142.] 43 C.F.R. § 3162.3-1.

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

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

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

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

The regulations also ensure that well development and drilling is carried out with due regard for the prevention of waste and injury. The comprehensive federal regulatory framework is designed to protect correlative rights, the resource, and the environment. 43 C.F.R. § 3162.1 (requiring the operator to assure maximum economic recovery of oil and gas by minimizing waste and adverse effects on ultimate recovery of other mineral resources); 43 C.F.R. § 3162.3-1(e) (each drilling plan should describe expected hazards, and proposed mitigation measures to address such hazards); 43 C.F.R § 3162.5-1 (operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality). The federal regulations discussed above, in conjunction with the case law and the District Court's findings of fact, establish that New Mexico plays no substantive regulatory role on the New Mexico Lands.

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

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

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

[13] 43 C.F.R. § 3 162.3-1(a) provides that an oil and gas well shall be drilled "in conformity with an acceptable well-spacing program." The regulation further provides in relevant part that such program is either "one which conforms with a spacing order or field rule issued by a State Commission or Board and accepted by the authorized officer" or "any other program established by the authorized officer."

ability to overrule the COGC's spacing order. 129 I.B.L.A. at 3-5.

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

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

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

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

One of the regulatory functions Homans claims to offer operators on the New Mexico Lands is access to New Mexico's administrative process for resolving disputes between operators. (Opening Br. 52.) However, the District Court found that there is no evidence that operators have used the NMOCD hearing process to resolve disputes concerning extraction on the New Mexico Lands. [RP 200, Finding 252.] Further, as noted by the District Court, NMOCD's administrative efforts are unnecessary for resolving disputes over oil and gas development on the New Mexico Lands because the BLM already has

an adjudicative process to resolve such disputes, including the right to administrative review and appeal. [RP 190, Findings 168-70.] [RP 230.] The District Court's findings are supported by the decision in San Juan Citizens Alliance et al and the federal regulations which specifically allow for such appeal. 43 C.F.R. §§ 3160.0-1; 3160.0-2; 3162.3-1(a); 3 165.4(a).

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

Homans also notes that New Mexico holds administrative hearings and approves requests for commingling and non-standard locations. (Opening Br. 52.) While the District Court did find that NMOCD has approved requests for nonstandard locations and commingling [RP 200, Finding 253] when asked to by operators—and never the Tribe or the BLM—these hearings have been minimal. At trial New Mexico was only able to present six orders for the period of 1996- 2006. [RP 602-05, 629-32, 717-19, 807-16, 847-52, 901-04, 999-1003.] Further, Mr. Hammond, Energy Director for the Tribe, testified that between 1950 to 2009, a period of 59 years, he was only able to locate a total of 25 hearing orders which purported to address production on the New Mexico Lands. [TR 48]. Finally, NMOCD admits that the hearings rarely involve the appearance of a party disputing the request. [TR 376]. The minimal number of hearings over the years shows that New Mexico

does not provide the valuable regulatory function of eliminating waste and protecting correlative rights.[14]

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

Homans asserts that the sharing of publicly available documents with BLM and the text of four[15] federal regulations creates a cooperative regulatory relationship between the BLM and NMOCD. (Opening Br. 56-57.) Homans states that New Mexico has a long-standing cooperative regulatory relationship with BLM, in recognition of their joint interests. (Opening Br. 56.) In support of this proposition, Homans notes first that the BLM initially processes APDs on the New Mexico Lands, and then sends the forms on to NMOCD for its approval; second, that relevant federal regulations invoke state law and remind the operator of the need to comply with state law; and third, that the BLM has reminded the Tribe of the availability of NMOCD's service of plugging and abandoning wells without charge. (Opening Br. 56- 57.) Each of these statements is refuted below.

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

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

As discussed above, by federal law only the BLM may approve an APD. 43 C.F.R § 3 162.3-1. Further, after several days of trial where New Mexico frequently contended it had to approve APDs, the District Court concluded that the BLM sends an APD to NMOCD only after BLM has already approved it. [RP 189, Finding 157.] The findings of fact also establish that it is the BIA, BLM, and the Tribe that consult regarding issues raised by APD applications. [RP 189, Finding 150.] While New Mexico can consult with operators and can engage the BLM in a technical discussion, it has no regulatory role.

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

Finally, 43 C.F.R. § 3162.5-3 provides that compliance with health and safety requirements

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

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

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

Homans raises several environmental issues in an attempt to assert that New Mexico has a regulatory interest on the New Mexico Lands. In the Opening Brief, Homans notes that oil and gas operations can cause groundwater contamination and can disrupt the surface, which may cause environmental effects. (Opening Br. 17.) However, the District Court found

that in this case there is no evidence in the record of actual or potential contamination of groundwater or potential environmental effects on adjoining private, state, federal, or tribal lands from oil and gas operations on the New Mexico Lands. [RP 191, Findings 178, 180.] Indeed, as discussed above, the federal regulations provide specific authority for the BLM to act to protect groundwater and the environment. 43 C.F.R. §§ 3162.5- 1, 3 162.5-2, 3 162.3-2.

Despite these findings and regulations, New Mexico notes that BLM has recently approached NMOCD to discuss a potential problem with H2S gas. (Opening Br. 58 n. 6.) However, Congress has delegated BLM, not New Mexico, the authority to require operators to perform operations and maintain equipment in a safe and workmanlike manner, and this authority allows BLM to address any potential problems with H2S gas. 43 C.F.R. § 3162.5-3. Further, mere consultation with the state is not equivalent to delegation of regulatory authority from the federal government to the state.

Next, Homans states that New Mexico has built and maintained an elaborate regulatory infrastructure, including environmental clean-up. (Opening Br. 52.) It is true that on one occasion in the late 1980's NMOCD became involved in one clean up on the New Mexico Lands and that NMOCD's involvement included having the operator cleanup a spill to NMOCD standards and inspecting the site to confirm the work. [RP 181, Finding 66.] However, in recent times, the Tribe's Department of Energy has assumed responsibility for detecting spills: once a spill is detected, the Department asks the operator and the BLM to cleanup the spill [RP 181, Finding

67], and the Tribe generally does not make use of New Mexico's environmental cleanup and site inspection [RP 199, Finding 250].

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

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

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

Because New Mexico has no contact with the BIA and limited contact with the BLM and the Tribe [RP 189, 194-95, Findings 156, 207, 209], it is left to contend that it regulates the New Mexico Lands by policing operators under state rules that cannot reach the Ute Mountain Ute Reservation. As stated in the District Court opinion, if BLM chose to ignore

a New Mexico regulation or order and enforce its own regulation or order and NMOCD tried to enforce its conflicting regulation or order, NMOCD would immediately run afoul of the Supremacy Clause. "Although NMOCD has a certain amount of power over the operators, it cannot use that power to acquire jurisdiction over the New Mexico lands." [RP 230.]

In conclusion, when taken as a mixed question of law and fact, New Mexico simply fails to demonstrate that it plays any regulatory role on the New Mexico Lands. In this case, unlike Cotton, there is simply no regulatory role for the State. Therefore, this Court should uphold the District Court's determination that the federal regulatory scheme is exclusive and that the five New Mexico taxes are therefore unjustified. As discussed below, these unjustified taxes result in significant harm to the Tribe.

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

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

applying a simplistic "quantitative" test for purposes of determining if the State's five taxes caused economic harm to the Tribe. (Opening Br. 48.)

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

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

increased production through discovery of new sources of oil and gas or through infill or reopening of closed wells would increase the Tribe's revenues. [RP 205, Findings 300-01.]

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

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

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

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

> reduced by the amount of the UMUT tax increase...

[RP 198, Finding 243.] Thus, for wells drilled after July 1, 1995, the Intergovernmental Production Tax Credit offered by New Mexico actually penalizes Indian tribes who seek to increase revenue from oil and gas production, since a tribal tax increase would result in a concomitant reduction in the Intergovernmental Production Tax Credit available to operators on the New Mexico Lands. This imposes multiple burdens on tribal governments. Because increased production would result in increased revenue for the Tribe, this effect is a direct economic burden on the Tribe [RP 205-06, Findings 300, 310], and is a disincentive to all new drilling on the New Mexico Lands, as found by the District Court.

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

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

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

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

Homans spends a significant portion of the Opening Brief rehashing stale arguments that New Mexico provides substantial services related to the oil and gas production on the New Mexico Lands. (Opening Br. 52-57.) First, Homans argues that this Court should reverse the District Court's de minimis on-reservation services finding of fact. (Opening Br. 53.) Second, Homans argues that the off- reservation services provided to the operators should have been factored into the District Court's preemption analysis. (Opening Br. 54.) However, these arguments were already soundly rejected by the District Court on the basis of both the well-analyzed findings of fact and well-settled principles of federal law. [RP 233-34.] In addition, these arguments inappropriately request this Court to eviscerate the

Bracker preemption analysis. This section will address each faulty argument in turn.

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

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

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

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

Nonetheless, Homans attempts to circumvent finding of fact 264 by trying to re-litigate the magnitude of the services it provides on the New Mexico Lands. Here, Homans first argues that taxation of the operators should be justified by the "elaborate regulatory infrastructure" of hearing and administrative processes, the state's publicly available records, and the state's environmental cleanup and site inspection services. (Opening Br. 52.) As more fully explained above in Section

IV(A)(2), this argument directly contradicts the uncontroverted findings of fact that there is no evidence that either the Tribe or the BLM have used the hearing processes, the records, or the environmental cleanup and site inspection services. [RP 199, 200, Findings 245, 250, 252-54.] See also [RP 229-33].

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

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

Homans makes another attempt to reverse the de minimis finding by arguing that the State services are not measured by the actual services provided on the New Mexico Lands, but rather by some theoretical willingness to provide these services. (Opening Br. 55.) To support this, Homans inaccurately cites to the Commerce Clause analysis in Cotton Petroleum, and not to any applicable preemption analysis. (Opening Br. 55 (citing Cotton Petroleum, 490 U.S. at 190).) Homans has not provided any other case law support for this novel "theoretical services" argument (and indeed, it cannot do so because such support does not exist).

Homans has no case law support because the "theoretical services" argument would eviscerate the balancing test set out in Bracker. The Bracker

analysis is a factually-sensitive analysis that forces the reviewing court to assess and balance the actual interests and services at stake for the particular federal, tribal, and state entities involved. See, e.g., Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1190 (9th Cir. 2008) (noting the factual sensitivity of the test); Ramah, 458 U.S. at 843 (holding that the State's actual declination to educate Indian children precluded it from imposing a burden on the comprehensive federal scheme); Cotton, 490 U.S. at 172 n. 7 (analyzing the actual State services provided to the Jicarilla Apache Tribe). If any state were able to tip the balancing test in its favor simply by offering services or regulation on reservation lands, the Bracker analysis would be turned on its head. In this factual context, any state offer to use its statewide procedures on a reservation would nullify the presence of the relevant federal regulation and tribal in-house oil and gas regulation.

As it is, the Bracker analysis is a flexible but concrete analysis that is intended to assess the actual extent of competing management practices and interest on tribal land. Accordingly, Homans' far-reaching argument that theoretical services justify on-reservation taxation is groundless.

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

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

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

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

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

The second flaw in Homans' argument is found in his interpretation of the District Court's finding that "[w]ithout an off-reservation infrastructure in New Mexico to transport oil and gas, the economic value of the oil and gas produced on the New Mexico lands would be substantially less." [RP 201, Finding 262.]

Homans mischaracterizes this finding by stating that without the off-reservation infrastructure the oil and gas has "no discernable market value." (Opening Br. 8, n. 2.) Of course, most Indian tribes are dependent upon the processing, transportation, and sale of their resources outside of their reservations because they have not had self-sustaining economies since colonization. If the value of off- reservation marketing and processing is relevant, then virtually any economic activity on an Indian reservation may be taxed by a state, but that has not been factored into the Supreme Court's preemption analyses. Off-reservation benefits are simply irrelevant to a preemption analysis.

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

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

The Tribe recognizes the District Court's finding that the off-reservation services to the operators are of substantial value to the Tribe. [RP 201, Finding 265.] Although the Tribe notes that Homans exaggerates the importance of these services (after all, Homans' role is to regulate, and not to build or maintain the oil and gas processing infrastructure), it recognizes Homans' right to tax them. Under Ramah, the proper way for Homans to collect revenues for off-reservation services is to tax those off-reservation activities. Ramah, 458 U.S. at 845 n. 9 (stating "Presumably, the state tax revenues derived from [contractor's] off-reservation business activities are adequate to reimburse the State for the services it provides to [contractor]."). See also [RP 234.]

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

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

Homans' characterization of this case as "Cotton Petroleum revisited" ignores the Bracker preemption analysis. Homans attempts to shoehorn this case into

the balancing test conclusion reached in Cotton by asserting, "[t]he only factual differences of significance between the instant case and Cotton Petroleum stem from the fact that the portion of the Ute Mountain Ute Reservation which is in New Mexico is unpopulated." (Opening Br. 30.) However, this argument ignores the flexible, factually-sensitive preemption analysis developed in Bracker (and carried forth in Ramah, Mescalero Apache, and Cotton) and the District Court's painstaking work to analyze and balance the competing federal, tribal, and state interests at stake on the New Mexico Lands.

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

Here, unlike the Jicarilla Apache Tribe in Cotton, the Ute Mountain Ute Tribe has a strong history of tribal sovereignty in the area of oil and gas activity. See Sections II, IV(A)(1), supra. The Tribe has carried this history forward by working with the BLM, the BIA, and MMS to regulate oil and gas activities on the New Mexico Lands and to generate

much-needed revenue for its impoverished membership. See Section IV(A)(1), supra. The success of the federal-tribal program has simply left no room (or need) for any state regulation or services. See Section IV(A)(2), supra. In addition, the state taxes in this case (unlike the Cotton taxes) do cause economic harm to the Tribe. See Section IV(B), supra.

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

V. Conclusion

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

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

[Signatures and Certificates Omitted]