NO. 09-2276

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE MOUNTAIN UTE TRIBE,

Plaintiff/Appellee,

v.

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

Defendants/Appellants.

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

DEFENDANTS/APPELLANTS' REPLY BRIEF

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In the opening brief, Secretary Homans argued that there is no substantial difference between this case and *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). The Ute Mountain Ute Tribe responded by attempting to demonstrate that there are substantial differences, sufficient to remove the case from *Cotton Petroleum's* shadow. The State's purpose here shall be to address the arguments advanced by the Tribe. The necessary conclusion, we submit, is that the factual differences have no legal significance, and that the outcome here is driven by *Cotton Petroleum.*

I. FACTUAL DIFFERENCES BETWEEN *COTTON PETROLEUM* AND THE CASE PRESENTLY ON APPEAL DO NOT REMOVE IT FROM THE RULE IN *COTTON PETROLEUM*

We know from the case law that state taxes on non-tribal entities conducting oil and gas activities on tribal lands are not categorically barred. *Cotton Petroleum*, 490 U.S. at 175. Following Supreme Court precedent, the courts apply a flexible preemption analysis sensitive to the relevant facts and legislation involved to determine whether such taxes can be imposed. *Id.* at 176.

An initial question in any such inquiry, therefore, is where the legal incidence of the tax lies. In the instant appeal, the incidence of the New Mexico taxes falls on the taxpayers – the non-tribal/non-Indian oil and gas lessees. [Finding 286, RP 203] The trial court found that the taxes are not passed on to the Tribe by its lessees, but do have an indirect economic impact on the Tribe.

[*Compare* Finding 286, RP 203 *and* Finding 310, RP 206] As to this particular subject of inquiry, therefore, the case on appeal is identical to *Cotton Petroleum*. 490 U.S. at 186-187. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 114 (2005) ["The Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues."] (citing Supreme Court cases).

The inquiry does not end there. The case law teaches that even if the legal incidence of the taxes falls on the non-tribal lessee, the taxes shall be prohibited if they are preempted by federal law or if they would interfere with the tribe's ability to exercise its sovereign functions. *Cotton Petroleum*, 490 U.S. at 176-177.

The court below found that the New Mexico taxes do not interfere with the Tribe's inherent sovereignty. [Finding 311, RP 206] Thus, the analysis of the case is focused on the question of federal preemption. Recognizing this, the Tribe's brief is devoted to the elements of preemption identified by the Supreme Court – are the applicable federal regulations so extensive as to be exclusive? *Cotton Petroleum*, 490 U.S. at 185. And, does the state have a specific, legitimate regulatory interest in the on-reservation activity of the non-tribal taxpayer, and does it provide services related to that activity? *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 843-45 (1982).

A. The State's interest in the activities of the oil and gas industry anywhere in New Mexico, including activities originating on an Indian Reservation, is as strong today as it was in 1989, when *Cotton Petroleum* was decided.

1. The State provides governmental services related to the oil and gas activity conducted on Ute Mountain Ute tribal lands.

New Mexico is a major producer of oil and natural gas. *Amoco Production Co. v. Watson*, 410 F.3d 722 (D.C. Cir. 2005). New Mexico's Oil and Gas Act, dating to 1935, created the State's Oil Conservation Commission. The principal duties of the OCC are to conserve these exhaustible resources through the prevention of waste and protection of correlative rights. NMSA 1978, § 20-2-11. [Finding 49, RP 179] *See El Paso Natural Gas Co. v. OCC*, 76 N.M. 268, 414 P.2d 496 (1966); *Continental Oil Co. v. OCC*, 70 N.M. 310, 373 P.2d 809 (1962).

The oil and gas fields in which the taxpayers operate are in New Mexico. There are three different governmental entities, therefore, New Mexico, the Tribe and the United States, which have taxing jurisdiction over all of the non-Indian leases. *Cotton Petroleum*, 490 U.S. at 188.

OCC's responsibilities extend to the provision of gathering line and pipeline easements for the oil and gas industry. The New Mexico Gathering Line Acquisition Act, NMSA 1978, § 70-3A-1, *et seq.*, provides a streamlined procedure by which oil and gas operators can acquire easements across private property for their gathering lines, *i.e.* the gathering lines which transport raw

natural gas from the point of extraction to a processing facility. The statute protects the industry by placing a cap on the calculation of monies owed for any such easement. NMSA 1978, § 70-3A-5(C)(5).

Oil and gas pipeline companies are regulated by the OCC. NMSA 1978, § 70-3-1, *et seq*. The pipelines such companies operate are of obvious importance to any person or entity having an interest in the sale of oil and gas, be it a royalty owner, such as the Tribe or the State itself, or a lessee, such as any of the non-tribal operators which extract oil and gas on the Ute Mountain Ute reservation. Pipeline operators in New Mexico have been granted the power of eminent domain. NMSA 1978, § 70-3-5.

OCC also oversees health and safety issues unique to the oil and gas industry. [RP 191]

No reasonable person could deny that New Mexico has a legitimate governmental interest in regulating the oil and gas industry within its borders. We do not understand the Tribe to make such a contention. Instead, the Tribe argues that its land in New Mexico is an economic island of sorts, cut off from, and entirely independent of the broader New Mexico oil and gas dynamic. To make this argument, it is necessary to ignore, or somehow trivialize, the established fact that the oil and gas extracted on the Tribe's lands only acquires its economic value

after being transported off the reservation, utilizing a governmental infrastructure which was created by, and is maintained by, the State.

The State's economic expert, John Tysseling, Ph.D., elaborated in his report, which was admitted as a trial exhibit:

> It is simply not sufficient to have discovered oil or gas resources, but there must also exist an ability to *market* the resources (at a profit). This is less difficult for oil, as oil production can be trucked to a market outlet. However natural gas must be connected to gathering systems, treating and processing facilities, and ultimately to an interstate gas pipeline to move from the San Juan Basin to the ultimate end users of natural gas.
>
> The early history of exploration and production demonstrate this fact as well. From the time of the first discovery until the late 1940s only the oil resources of the Tribe were developed. It was not until the arrival of the interstate and intrastate pipelines in the basin – El Paso Natural Gas ("El Paso"), Northwest Pipeline Company and Southern Union Gas Company ("Southern Union") – that there was any significant development of the Tribe's natural gas resources. Since then, natural gas has been the primary petroleum resource recovered from the Tribe's property.
>
> The oil producing fields of the reservation are widely distributed across the Tribe's lands in both Colorado and New Mexico. The developed natural gas resources are predominately located in New Mexico. Access to the gathering systems developed by El Paso and Southern Union, as well as the treating and processing plants connected to those gathering systems (also located in New Mexico), provide the economic infrastructure necessary to allow for the development of the Tribe's gas resources. *Without this infrastructure there is no market for the gas* – and therefore the gas is (substantially) without economic value absent these systems. (citing *Amoco Production Co. v. Watson*).
>
> . . .

> Prior to the mid-1990s, gas produced in New Mexico tended to be lower priced compared to other production areas by more than just a transportation cost differential, because of limited market access and constrained pipeline capacity, factors that served to constrain the volume produced from the San Juan Basin. From mid-1990 onward, New Mexico gas has generally received a higher price than previously due to higher demand from California, where a sizable majority of New Mexico gas has been delivered. Furthermore, production increased because of pipeline infrastructure improvements that allow movement for New Mexico gas to eastern markets. Gas from San Juan County now has access to multiple pipelines from the Blanco Hub established in 1993, and the Waha Hubs, established in 1995.

[RP 1441-1442; 1448] (some internal citations omitted; emphasis in the report).

The Tribe agreed. [*See* the trial testimony of Gordon Hammond, TR 34-35; 109-115]

There is no evidence in the record contradicting the testimony which shows the economic continuum beginning on the reservation and moving off of the reservation. Hence, the trial court's findings that:

> 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.

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.

[Findings 260-263, 265, RP 200-201][1]

Two salient questions thus present themselves: does *Cotton Petroleum*, fairly read, suggest that state services must be delivered on the reservation itself for the state's taxes, imposed on the non-tribal lessees, to be collectible? Also, does *Cotton Petroleum* suggest that state services must be provided to both the non-tribal lessees ***and*** the Tribe itself?

There is no requirement in the case law that state services be provided directly on tribal lands, or to both the taxpayer and the royalty-holding tribe. In *Cotton Petroleum*, the Jicarilla Apaches did not bar NMOCD (an arm of NMOCC) from its reservation. In the portion of its Opinion discussing the taxpayer's contention that federal regulations were effectively exclusive, the Supreme Court noted that "the state regulates the spacing and mechanical integrity of wells located

[1] In the trial court's Finding No. 264 [RP 200], the court found that "the economic value of services provided by the State of New Mexico on the New Mexico lands to oil and gas operators is *de minimus*." The Tribe seems to interpret New Mexico's opening brief as challenging that finding. This is incorrect. New Mexico did not, and does not, question the accuracy of the court's finding in that regard. The Tribe's effective closure of its reservation to NMOCD made the finding inevitable. The legally significant point is driven by the court's Findings 260, 261, 262, 263 and 265. [RP 200-201]

on the reservation." *Cotton Petroleum*, 490 U.S. at 185-86. This piece of evidentiary information was offered as an example of the State's contact with the oil and gas activity, a contact the court had found lacking in *Bracker* and *Ramah*. Nowhere does the *Cotton Petroleum* court say, or even hint, that the State must provide services on the reservation itself to pass the test. When one reads *Cotton Petroleum* as a whole, the unmistakable point made is that a court will look at the state's contact with the ***activity*** in question, which in both *Cotton Petroleum* and the instant case is the production and sale of oil and gas.

In *Cotton Petroleum*, state services were provided both on and off the Jicarilla reservation. In the case before the Court today, substantial State services are provided off the reservation, but these are without question services related directly to the lessees' on-reservation activity, services which substantially enhance the value of the oil and gas extracted. The economic reality is that the Tribe and its lessees are not self-sufficient when it comes to the production and marketing of oil and gas. The activity conducted on the reservation by the non-tribal taxpayers is simply the first step in the creation of profits for the taxpayers and royalties and taxes for the Tribe. The subsequent steps take place off the reservation, in New Mexico. The producers take full advantage of the infrastructure made possible by New Mexico law.

The Tribe makes too much of some language it finds in *Ramah*. The passage in question says this:

> The only arguably specific interest advanced by the State is that it provides services to Lembke 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. The New Mexico Gross Receipts Tax is intended to compensate the State for granting 'the privilege of engaging in business.' N.M. Stat. Ann. §§ 7-9-3(F) and 7-9-4(A) (1980). New Mexico has not explained the source of its power to levy such a tax in this case where the 'privilege of doing business' on an Indian reservation is exclusively bestowed by the federal government.

Ramah, 458 U.S. at 843-44 (emphasis the court's).

In *Ramah*, the point the court was making was that the Navajo Nation's contractor, Lembke Construction Company, constructed a school on tribal lands. The taxpayer's work started and ended entirely on the reservation. Addressing that reality, the Court concluded that State services provided to Lembke off the reservation, in its general status as a licensed contractor with other projects in New Mexico, was separate from the stand-alone construction project at issue. There was no general pronouncement by the court that the provision of State services off the reservation is irrelevant. Indeed, seven years later, in *Cotton Petroleum*, the court said this:

> Cotton's most persuasive argument is based on the evidence that tax payments by reservation lessees far exceed the value of services provided by the state to the lessees, or more generally, to the reservation as a whole. There are, however, two sufficient reasons for rejecting this argument. First, 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.

Cotton Petroleum, 490 U.S. at 189.[2]

The courts would hardly be in a position to apply a flexible, case-specific test of governmental interests if Supreme Court precedent required them to stop any evidentiary inquiry at the border of an Indian reservation. Citing both *Ramah* and *Bracker*, the court in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) said "our prior decisions also guide our assessment of the state interest asserted to justify state jurisdiction over a reservation. The exercise of state

[2] The Tribe infers in its brief that the Court might hold that New Mexico can tax the lessees' off-reservation activities. (*See* the Answer Brief at pp. 50-51.) It bases this thought on language from *Ramah* saying "presently, the state tax revenues derived from [the contractors'] off-reservation business activities are adequate to reimburse the state for the services it provides to [contractor]." 458 U.S. at 845. But the point the Supreme Court was making was that New Mexico validly taxed Lembke on the proceeds from work it did in the state generally, unconnected with the Navajo school project. Work done by Lembke on the reservation was in one box, so to speak, while other work the company did around the state was in another. The nature of oil and gas activity is fundamentally different than a discreet construction project, making separation of on- and off-reservation activity logically impossible. There is no suggestion by the court in *Cotton Petroleum*, an oil and gas case, that the economic dynamic of the industry can be chopped into taxable and non-taxable segments. *See Wagnon v. Prairie Band Potawatami Nation*, 546 U.S. at 111 [". . . the cases identified in *Bracker* as supportive of the balancing test were exclusively concerned with the on-reservation conduct of non-Indians."]

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***." 462 U.S. at 336 (emphasis added).

The lower courts have expressed their understanding that the required nexus is between the State's services and the relevant economic activity. *See Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734, 736 (9th Cir. 1995), cert. den. 516 U.S. 868 ("The Supreme Court has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: 'the degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue-raising), and the provision of tribal or state services to the party the state seeks to tax.'"); *Keweenaw Bay Indian Community v. Kleine*, 546 F. Supp. 2d 509, 524 (W.D. Mich. 2008) ("Relevant factors include state regulatory or service functions related to the subject of taxation. . . ."); *Yavipai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), cert. den. 522 U.S. 1076 ("A straightforward application of our trilogy of cases confirms the conclusion reached by looking at the food and beverage sales and the room receipts separately. All of the sales are by non-Indians to non-Indians. There is no tribal employment. There is no active tribal participation in the business. The state provides substantial governmental services to the business taxed. These four factors were decisive in *Salt River* and *Gila*

River II. The ownership of the fee, the regulation of the leases by the Secretary of the Interior, minor tribal regulatory acts, and the impact of state taxation on tribal income were not enough to outweigh them. They fail to do so here.”). *See, also, Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008) [Court refuses to limit *Bracker* analysis to on-Reservation transactions when economic reality extends beyond Reservation.]

Extending the logic in *Cotton Petroleum*, the legitimacy of state taxation on non-tribal mineral lessees is not dependent on the provision of state services to the tribe itself. (*See Salt River Pima-Maricopa Indian Community* and *Yavipai-Prescott Indian Tribe*.) In *Cotton Petroleum*, a range of state services was provided to the Jicarilla Apache Tribe and its members, who, unlike members of the Ute Mountain Ute Tribe, lived in New Mexico, and this was mentioned in the court’s opinion. But the court did not suggest that the delivery of state services to the tribal lessor is necessary for state taxation of the non-tribal lessee to be valid. The taxpayers in *Cotton Petroleum*, as in this case, were the lessees, and “the primary burden of the state taxation falls on the non-Indian taxpayers.” *Cotton Petroleum*, 490 U.S. at 187. It is the activity of the oil and gas lessees that must have a meaningful connection with state services. (*See* the *Cotton Petroleum* court’s discussion of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), at 490 U.S. 169-170.)

In *Ramah*, the Supreme Court linked the state tax to "the governmental functions it [the state] provides to those who must bear the burden of the tax." 458 U.S. at 833. In that instance, the burden of the state tax was borne by the Navajo Nation because the tax was passed on to it. In the present appeal, as in *Cotton Petroleum*, just the opposite obtains – the New Mexico taxes are paid by the non-tribal entities and are not passed on to the Tribe.[3]

The trial court's decision is based on a rigid distinction between on-reservation and off-reservation state services, a distinction which is not part of the *Bracker* test. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) instructs that a court should apply a "flexible analysis, sensitive to the relevant facts," and in the "specific context" of the case before it. 448 U.S. at 145. The specific context of this case involves the production, preparation and sale of substances in a continuous economic current, beginning on the reservation and

[3] At page 9 of its brief, in a footnote, the Tribe promises to show that the oil and gas extracted on the reservation has meaningful value as it comes out of the ground in its raw state. When the reader turns to the section of the brief referenced, however, the promise is not kept. The trial court found that these hydrocarbons attain their value downstream, off the reservation. [Finding 262, RP 201] The Tribe does not dispute the fact that its royalties and tribal taxes are derived from the sales prices of the oil and gas, *i.e.* the prices actually obtained or calculated after these substances are processed for market. Pointing out that federal regulations assure this by providing for the utilization, if necessary, of a national index which represents the average of sales within the region evades the point. Both parties agree that New Mexico taxes are "directed at off-reservation value." Both parties also agree that the taxpayers, the Tribe's lessees, are "the recipients of state services." *See Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 156-57 (1980).

ending off of it. A state cannot assess a tax against a non-Indian entity whose work on Indian lands passes its entire economic life on those lands when the burden of the tax is passed on to the tribe. In such circumstances, the taxes are preempted by judicial inference. *Bracker, Ramah*. The same cannot be said of the sale of hydrocarbons, which only attain their economic life at the end of the stream, off the reservation, and where the state tax is not passed on to the Tribe. *Cotton Petroleum*.

2. The federal regulations dealing with oil and gas production on Indian lands are not exclusive.

The second element to be weighed in the Court's preemption analysis deals with the impact federal regulations have on the matter. It is not enough for federal regulations to be extensive (and in this case they are). If the federal regulations are extensive but not exclusive, the state's interest in the oil and gas operations, insofar as its own regulatory oversight is concerned, is not reduced to the point where its only function is to raise revenue. *Cotton Petroleum*, 490 U.S. at 185-186.

The State will not attempt to over-interpret *Cotton Petroleum*. We assume a rule of reason stands behind the *Cotton Petroleum* court's "extensive, but not exclusive" standard. If a case could be found where a body of state regulations nominally applied to on-reservation activities by non-Indian operators, but in practice those regulations were ignored by both the regulator and the operator, a reasonable argument could be made that the federal regulations, pragmatically

speaking, are "exclusive." But there is no need to pursue that thought. In the case presently on appeal, there is a comprehensive set of State oil and gas statutes and regulations which apply to the non-tribal lessees' on-Reservation and off-Reservation activities. The lessees comply with them. [TR 307] Those State statutes and regulations follow the lessees as they move oil and gas off of the reservation in preparation for entry into the marketplace. The whole process is one, unbroken economic continuum. [RP 200-201]

In *Bracker* and *Ramah*, there were no state regulations which purported to deal with logging operations or school construction on tribal lands. The federal regulations were literally exclusive. *Cotton Petroleum*, 490 U.S. at 186 Unlike the case at bar, the economic activities in *Bracker* and *Ramah* did not begin on the reservation and then continue off of it. Nor did the activities logically implicate state interests. There was nothing about logging on the White Mountain Apache reservation, or building a school in the Navajo Nation, that would potentially create property, health or safety concerns on adjacent non-tribal lands.

The *Bracker* test balances governmental ***interests***. The State's interest in such things as the spacing of wells, the integrity of wells, and prevention of air and water contamination extends onto any Indian reservation in New Mexico. Overly-aggressive spacing and poorly maintained wells create the danger of waste. [TR 212-214; 235-236; 247-249; 299-301; 367-368] The leaking of hydrogen

sulfide into the air, or of chemicals into groundwater, threatens surrounding properties. [TR 114; 129-130; 231-233] Making it possible for the industry to erect gathering lines and pipelines, and the regulation of those facilities, is equally important to the State. New Mexico's oil and gas statutes and regulations enable the State to participate in the regulation of each aspect of the oil and gas dynamic, from initial exploration to introduction of the finished product into interstate pipelines. The creation of an orderly regulatory environment, from beginning to end, enables all New Mexico producers to have equal access to the market, playing under the same set of rules. [RP 1441-1442; 1448] The State regulatory scheme places burdens on operators, but protects their interests as well. *See, generally, Burford v. SunOil Co.*, 391 U.S. 315, 319-320 (1942).

BLM and the Tribe's lessees avail themselves of the regulatory protections afforded by New Mexico. [TR 110; 138-139; 141-142; 145-147; 212-213; 226-229; 235-236; 247-250; 259-260; 283-284; 292-294; 299; 302-306; 309; 316-317; 328-330; 380-382; 392; 418-429] The submissions the lessees make to NMOCD, their ongoing compliance with New Mexico's laws and administrative regulations, and usage of New Mexico's regulatory infrastructure off of the reservation all add value to the fruits of their labors. By participating in an established regulatory environment, provided in part by the State and in part by BLM, the lessees are better able to gain the economic advantages of the marketplace. This inures to the

benefit of the Tribe, in its dual capacities as taxing authority and royalty holder. *See Cotton Petroleum*, 490 U.S. at 190 ("The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.").

We know from *Cotton Petroleum* that the courts will not involve themselves in parsing the services actually consumed by a given taxpayer. It is the availability of the services that count. *Cotton Petroleum*, 490 U.S. at 189-190 (". . . there is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer – or by those living in the community where the taxpayer is located – must equal the amount of its tax obligations. . . .").

The Tribe's response is to provide a list of federal regulations dealing with oil and gas activity on tribal lands. New Mexico has never contended that the Department of Interior has no interest, or a lesser interest than itself, in the subject. Given the reasoning in *Cotton Petroleum*, there is no need to determine which sovereign's interest is the greater, or which has promulgated the greater numer of administrative regulations. As long as New Mexico has a legitimate governmental

interest in the activity in question, the State's ability to tax the non-tribal taxpayer is established. *See Cotton Petroleum*, 490 U.S. at 186-187.[4]

None of the federal statutes or administrative regulations in play say that state oil and gas regulations are preempted. Recognizing this, the Tribe attempts to construct an argument that Congress has inferentially preempted the State taxes. It focuses on a combination of things, *viz*, the date when the Ute Mountain Ute Treaty was signed (1895) and the dates and wording of various federal statutes. One purpose in going through this exercise is to make the argument that the

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[4] The Tribe's reference to *San Juan Citizens Alliance, et al.*, 129 IBLA 1 (1994) misses the mark. New Mexico does not take issue with the IBLA's statement that BLM "makes the final pronouncement on the spacing of oil and gas wells on Indian lands." *Id.* at 6. The section of the CFR upon which the statement is based was cited by the Court in *Cotton Petroleum* (490 U.S. at 186). The point the Supreme Court was making was that "although federal and tribal regulations are extensive, they are not exclusive, as were the regulations in *Bracker* and *Ramah Navajo School Bd.*" *Id.*

San Juan Citizens Alliance actually illustrates the fact that both the federal and state governments have legitimate interests in oil and gas operations on Indian lands, as that administrative appeal involved a difference of opinion between BLM and the Colorado Oil and Gas Commission on the advisability of a particular down-spacing application. The IBLA noted that down-spacing might increase knowledge of the underlying deposits of whole bed methane gas, both on and off the reservation. *Id.* at 8. *San Juan Citizens Alliance* does not stand for the proposition that the state in which an Indian reservation is located has no interest in oil and gas operations conducted on the reservation. Nor does it stand for the proposition that BLM offers an appeals process for all interested parties. The Meridian Oil Company, which protested BLM's down-spacing decision in that case, was another on-reservation operator. Thus, BLM had jurisdiction of all the interested parties.

language in 25 U.S.C. § 398, expressly approving of state taxation of non-tribal lessees, is a dead letter. This is incorrect.

There is no denying that the Congress, in 1924, affirmatively declared that the states can assess these kinds of taxes against non-tribal oil and gas lessees. 25 U.S.C. § 398. In 1938, Congress enacted the Indian Mineral Leasing Act, 25 U.S.C. § 398(a). That statute does not contain language dealing with the question of state taxation of non-tribal lessees.

For four years or so, a colorable argument might have been made that the 1938 Act impliedly repealed the express tax-authorization language in the 1924 Act. An expansive reading of *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) would have formed the premise of such an argument. But the *Cotton Petroleum* court clarified things by pointing out that *Blackfeet Tribe* deals only with attempts by a state to tax a tribe's royalties, something which is not at issue in this appeal:

> Our decision in *Montana* v. *Blackfeet Tribe*, 471 U.S. 759 (1985), is not to the contrary. In that case we considered the distinct question whether the 1938 Act, through incorporation of the 1927 Act, expressly authorized direct taxation of Indian royalties. In concluding that it did not, we made clear that our holding turned on the rule that Indian tribes, like the Federal Government itself, are exempt from direct state taxation and that this exemption is "lifted only when Congress has made its intention to do so unmistakably clear." *Id.*, at 765. We stressed that the 1938 Act "contains no explicit consent to state taxation," and that the reverse implication of the general repealer clause that the 1927 waiver might be incorporated "does not satisfy the requirement that Congress clearly consent to state taxation." *Id.*,

> at 766-767. Our conclusion that the 1938 Act does not expressly authorize direct taxation of Indian tribes does not entail the further step that the Act impliedly prohibits taxation of nonmembers doing business on a reservation.

Cotton Petroleum, 490 U.S. at 183, n.14 (*generally, see* the *Cotton Petroleum* court's discussion at 490 U.S. at 181-183, and *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 714-715 (1998) (reaffirming *Cotton Petroleum* on the point)).

The Tribe moves next to the Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. §§ 3501-3504, contending that this law signals a substantial change in congressional policy toward Indian tribes, so strong that preemption of state taxes assessed against non-Indians can be inferred. Nothing in the 2005 legislation supports the contention. The Act provides that an Indian tribe may, at its own discretion, but with the approval of the Secretary of Interior, enter into a lease or a more expansive business agreement for the purpose of energy resource development on tribal land. At the same time, the Act explicitly retains the Secretary's ultimate authority, up to and including "reassumption of responsibility for activities associated with the Department of Energy Resources on tribal land. . . ." 25 U.S.C. § 3504(e)(D)(ii). The Act also explicitly reaffirms that the "Secretary shall act in accordance with the trust responsibility of the United States relating to mineral and other trust resources," 25 U.S.C. § 3504(e)(6). 25 U.S.C. § 3504(f) provides that "nothing in this section affects the application of . . . the Indian Mineral Development Act of 1982 (25

U.S.C. § 2101, *et seq.*)," suggesting that the 2005 statute is not intended to supplant earlier legislation.[5]

In *Cotton Petroleum*, the court rejected the contention that a congressional intent to preempt state taxation can be found in the Indian Reorganization Act, 25 U.S.C. § 461, *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. § 1451, *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450, *et seq.* The court said that "although these statutes 'evidence to varying degrees a congressional concern with fostering tribal self-government and economic development,' *Colville*, 447 U.S. at 155, they no more express a congressional intent to preempt state taxation of oil and gas lessees than does the 1938 Act." 490 U.S. at 183.[6]

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[5] The 2005 Act also recognizes the states' governmental interest in the environmental and cultural effects of oil and gas activities on tribal lands. It requires a tribe to establish a process for consulting with any affected state regarding off-reservation environmental or cultural impacts of a Tribal Energy Resource Agreement. 25 U.S.C. § 3504(e)(2)(B)(x).

[6] Apparently, no argument was made in *Cotton Petroleum* that the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108, preempted state taxation of non-tribal entities. The court below made note of this in its Memorandum Opinion. [RP 221] The IMDA authorizes the Secretary of Interior to approve or disapprove any minerals agreement submitted to him by an Indian tribe and expressly states that the Secretary shall continue to have a trust obligation to ensure that the rights of a tribe are protected. 25 U.S.C. § 2103(e). Given the Supreme Court's analysis of the 1938 Act, Judge Parker correctly concluded that the IMDA is not preemptive of state taxation.

In short, Congress expressly authorized state taxation of tribal lessees in 1924 and has never withdrawn that authority. New Mexico recognizes that this, in and of itself, does not drive the outcome of the present appeal. It places the case in a *Bracker/Ramah* posture. This case is as distinguishable from *Bracker* and *Ramah* as *Cotton Petroleum* was, and for the same reasons.

CONCLUSION

This is a preemption case. The non-Indian taxpayers extract oil and gas from tribal lands in New Mexico and move these hydrocarbons along in the stream of commerce, utilizing various regulatory services provided by New Mexico. Some of those services apply to the taxpayers' on-reservation activities; others apply to directly related off-reservation activities as oil and gas are moved toward the market. Both the non-tribal taxpayers and the Tribe benefit from the regulatory environment New Mexico created and maintains. As was the case in *Cotton Petroleum*, and unlike *Bracker* and *Ramah*, the incidence of the State taxes falls on the non-tribal lessees. As was the case in *Cotton Petroleum*, and unlike *Bracker* and *Ramah*, the taxes are not passed on to the Tribe. As in *Cotton Petroleum*, the state taxes have not had an adverse effect on the Tribe's ability to attract oil and gas lessees.

The learned trial court was incorrect in its assessment that this case falls between *Cotton Petroleum* on the one hand and *Bracker* and *Ramah* on the other.

Given the economic dynamic of the taxpayers' involvement with their own oil and gas, the ownership of which vests in them at the point of extraction, a dynamic which is not confined to the reservation, the case falls squarely under the ruling in *Cotton Petroleum*, and is controlled by it.

The judgment of the district court should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of March, 2010 I filed the foregoing **Defendant-Appellant's Reply Brief** electronically through the CM/ECF system. I ALSO CERTIFY that Daniel Israel, Timothy Vollman, Peter Ortego and Troy Eid are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. I FURTHER CERTIFY that I mailed a copy of the foregoing brief to Daniel H. Israel, 1315 Bear Mountain Drive, Boulder, CO 80305; Peter Ortego, One Mike Walsh Road, P. O. Box 128, Towaoc, CO 81334; Timothy A. Vollmann, 3301-R Coors Road NW, #302, Albuquerque, NM 87120 and Troy A. Eid, Greenberg Traurig, LLP, 1200 17th Street, Suite 2400, Denver, CO 80202.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,037 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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