No. 11-729

In The
# Supreme Court of the United States

UTE MOUNTAIN UTE TRIBE,

*Petitioner,*

v.

DEMESIA PADILLA, SECRETARY,
TAXATION AND REVENUE DEPARTMENT
FOR THE STATE OF NEW MEXICO,

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Tenth Circuit**

## BRIEF IN OPPOSITION

JOHN B. POUND
LONG, POUND & KOMER, P.A.
2200 Brothers Road
P.O. Box 5098
Santa Fe, NM 87502-5098
505-982-8405
505-982-8513 (FAX)
lpk@nm.net
*Attorneys for Respondent*

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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## INTRODUCTION

This is a case which is virtually on all fours with *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). In each case, the question for resolution was whether the State of New Mexico could properly assess the same five oil and gas severance taxes. In each case, the taxpayers were not the Indian tribes or their individual members, but non-tribal business entities extracting oil and gas on tribal lands pursuant to mineral leases which had been negotiated with the respective tribes (the Jicarilla Apache tribe in *Cotton Petroleum* and the Ute Mountain Ute Tribe in the instant case). And, in each case, unlike *Ramah Navajo Sch. Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the non-tribal taxpayers did not pass the New Mexico taxes on to the tribe. In *Cotton Petroleum*, New Mexico's Oil Conservation Division ("NMOCD") had been instrumental in establishing the standards for well spacing and setbacks on the Jicarilla Apache reservation, standards which were then adopted by the Federal Bureau of Land Management ("BLM"). The same is true in the case presently before this Honorable Court.

In addition, in the case at bar, the oil and gas extracted by the non-tribal operators were transported off of the reservation, via roads and natural gas pipelines, for processing in New Mexico. The roads which are used to transport crude petroleum to the refinery were constructed and are maintained by the State of New Mexico. [Pet. App. 94a]. The natural gas

pipelines were constructed and are maintained under the regulatory jurisdiction and oversight of the State of New Mexico. *Id.* The District Court found that "without 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.* This is because oil and natural gas do not attain significant market value until they are processed.

As in *Cotton Petroleum*, the Ute Mountain Ute Tribe secured a substantial royalty interest in the oil and natural gas severed from its tribal lands by the non-tribal extractors. The tribe assessed severance taxes of its own against these non-tribal entities. Thus, the tribe itself benefits from the extractors' use of the off-reservation infrastructure made possible by the ongoing expenditures of public funds by the state. The uncontradicted evidence presented at trial established that the production of oil and natural gas on the tribal land, and the preparation of those substances for introduction into the national market, operates as an economic continuum beginning at the wellhead and ending at the off-reservation refineries, where the oil and gas are made ready for market. All of these activities take place in New Mexico.

The undisputed facts in this case show that the New Mexico Oil Conservation Division has a long-standing cooperative relationship with BLM, in recognition of their joint regulatory interests. BLM initially processes applications to drill on Ute Mountain Ute tribal lands, then sends the forms to NMOCD for its



approval. [Pet. App. 81a-82a]. Operators copy NMOCD, BLM and the tribe on matters involving locations on the reservation. *Id.* NMOCD has approved requests for non-standard locations and comingling on the Ute Mountain Ute Reservation. [Pet. App. 93a]. BLM has encouraged the tribe to take advantage of NMOCD's service of plugging abandoned wells without charge. New Mexico provides a hearing process for resolving disputes between operators. BLM has used that hearing process in deciding well spacing matters on tribal lands, including setting of spacing, approval of non-standard well locations, approval of non-standard spacing units and forced pooling. [Pet. App. 85a-86a]. As in *Cotton Petroleum*, BLM's regulatory function on tribal lands is extensive, but not exclusive. And, without the regulatory services provided by New Mexico, the oil and natural gas extracted from Ute Mountain Ute Lands in the state would not be marketable. [Pet. App. 94a].

Given the striking similarity of the factual record in this case and the factual record upon which *Cotton Petroleum* was decided, it is hardly surprising that the Court of Appeals concluded that the trial court had misapplied the law. Because the case at bar is identical to *Cotton Petroleum* in all substantive particulars, the conclusion reached by the Tenth Circuit is compelled by this Court's decision in *Cotton Petroleum*.

## REASONS FOR DENYING THE WRIT

This Court should deny the writ. The case is a mirror image of *Cotton Petroleum*. The Court of Appeals did not "overturn" the trial court's findings of fact. To the contrary, the appellate court explicitly acknowledged that the trial judge's findings of fact are not disputed. [Pet. App. 3a]. The judgment of the District Court was reversed because that court misconstrued the application of the law to those facts. The appellate court did not "concoct" anything. There is no circuit split, and the Tenth Circuit's decision will not create confusion among courts applying federal preemption analysis.

## THE "QUESTIONS PRESENTED" IN THE PETITION ARE NOT GENERATED IN THIS CASE

The Petition for Certiorari begins with recitations of two "questions presented." The first is a reference to "taxation without representation." This is an attention-grabbing device. Taxation without representation, after all, helped to ignite the American Revolution, pre-dating *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316 (1819) by fifty years. This rhetorical flourish has not been employed in the lawsuit until now, and for a reason. While it was the Ute Mountain Ute Tribe which brought the lawsuit and prosecuted it, neither the tribe nor tribal members pay the taxes in question.



The same taxes were at issue in *Cotton Petroleum*. The tribe and the state agree, and have always agreed, that these taxes are assessed exclusively against the non-tribal oil and gas operators which extract substantial quantities of these substances from Ute Mountain Ute land in New Mexico and, after refining the oil and gas off of the reservation, also in New Mexico, sell them for profit.[1]

The case does not involve the voting rights of members of the Ute Mountain Ute Tribe and does not involve New Mexico attempting to tax the tribe or its members.

The second question presented in the petition is based on the writer's presumption that the Court of Appeals misinterpreted *Cotton Petroleum*:

> Does *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), permit New Mexico to tax oil and gas operators' activities on Indian trust land even where, as here, ***"the State has nothing to do with the on-reservation activity, save tax it***?"

(emphasis added)

The District Court found that New Mexico provides substantial off-reservation services to the taxpayers, *i.e.*, the non-tribal oil and gas operators. It also found that the state, through its oil conservation

[1] The principal operators/taxpayers, in terms of volume, are Burlington Resources and XTO Energy. [Pet. App. 77a].

division, actively participates in the regulation of the oil and gas operators on Ute Mountain Ute tribal lands. Applying the trial court's findings, the Tenth Circuit held that this case, like *Cotton Petroleum*, is ***not*** one where "the state has nothing to do with the on-reservation activity, save tax it." [Pet. App. 46a].

## OVERVIEW OF THE APPELLATE DECISION

The District Court concluded that the five New Mexico taxes in question do not interfere with the Ute Mountain Ute Tribe's ability to govern itself. [District Court's Finding of Fact No. 206.] Therefore, the appeal presented the Circuit Court with what is purely a preemption issue. The Court recognized that preemption is primarily an exercise involving examination of congressional intent, although the history of tribal sovereignty serves as a necessary "backdrop" to that process. [Pet. App. 14a-15a], citing *Cotton Petroleum Corp. v. New Mexico*, and *Rice v. Rehner*, 463 U.S. 713 (1983).

The history of the Ute Mountain Ute Tribe's sovereignty in the field of oil and gas taxation informs the inquiry into congressional intent. If that history does not reflect immunization of the tribe's contractors from state taxation, there is no historical backdrop to be applied. Such taxes are upheld unless expressly or impliedly prohibited by Congress. [Pet. App. 15a], citing *Cotton Petroleum*, 490 U.S. at 173.



The Circuit Court's task was to determine if the instant case differs from *Cotton Petroleum* in any substantive way. Contrary to the assertion made by the Petitioner, the Court explicitly conducted a "particularized inquiry," guided by the Supreme Court's opinions in *Ramah* and *Cotton Petroleum*. That inquiry consumed the greater part of the Court's analysis. [Pet. App. 17a-51a].

Looking first to *Bracker*, the Court noted that the economic burden of the Arizona tax in question there ultimately fell on the tribe, which was contractually bound to reimburse its contractor. [Pet. App. 18a]. And, in *Bracker*, the state had no function at all in the harvesting of timber on tribal lands. *Id.*

The Court below then turned to *Ramah*. Again, the Court noted, the economic burden of the New Mexico Gross Receipts Tax ultimately fell on the Navajo Nation. [Pet. App. 19a]. New Mexico had "no duties or responsibilities when it came to the education of Indian children." [Pet. App. 19a-20a].

The outcome in *Cotton Petroleum* was different. The Circuit Court sought to discern why this was so. [Pet. App. 21a]. Parsing *Cotton Petroleum* carefully, the Court started by pointing out that state taxation of oil and gas extraction on tribal lands has been the subject of federal legislation for decades, going back to the Indian Mineral Leasing Act of 1938 ("IMLA," 25 U.S.C. §§ 396a-396g) and, more recently, the Indian Mineral Development Act of 1982 ("IMDA," 25 U.S.C. §§ 2201-08). The Court noted that "In the

present case, the leases and agreements entered into by the Ute Tribe were executed under the IMLA and IMDA." [Pet. App. 25a].

Citing *Cotton Petroleum* and *Montana v. Crow Tribe of Indians*, 523 U.S. 696 (1998), the Circuit Court agreed with the trial judge that the "IMLA, which governs almost all of the leases and agreements between the Ute Tribe and the oil and gas operators, does not expressly prohibit or expressly authorize taxation." *Id.*

Looking next to the IMDA, the Court agreed with the District Court that this statute does not differ from the IMLA. [Pet. App. 26a-29a]. Because it has been well established since the abolishment of the intergovernmental tax immunity rule that, absent clear disapproval by Congress, non-Indian oil and gas lessees are subject to state taxation, the Court concluded that the IMDA, like the IMLA, neither expressly prohibits nor expressly authorizes state taxation. [Pet. App. 29a].

The legal issue for resolution at this stage of the Court's analysis was whether there is anything about the Ute Mountain Ute Tribe's status as a treaty/statutory reservation which drives an outcome different than *Cotton Petroleum*. Its examination of relevant legislative history was greatly aided by the identical inquiry in *Cotton Petroleum*. After Congress enacted the Act of May 29, 1924, 25 U.S.C. § 398, the Court noted, "oil and gas lessees on statutory and treaty reservations were expressly subject to state taxation."



The IMLA followed in 1938, and the IMDA in 1982, but, since neither statute "materially altered the relevant taxation landscape," the Court reached the inevitable conclusion: "since 1938, oil and gas lessees operating on Indian reservations have been subject to non-discriminatory state taxation, as long as Congress has not acted to expressly or impliedly preempt such taxation." [Pet. App. 32a].

The Court then considered state, federal and tribal interests. It pointed out that in both *Cotton Petroleum* and the instant case, BLM had extensive and primary responsibility for regulation of oil and gas activity on Indian lands and that, in both cases, "state law applied not of its own force but only if application was approved by BLM." [Pet. App. 34a]. The existence of a cooperative regulatory relationship between the federal and state governments in *Cotton Petroleum* "was enough to support the conclusion that the federal regulations were not 'exclusive,' although they were 'extensive,' and therefore did not necessarily preempt the state taxes." [Pet. App. 35a-36a]. And, since "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*," there is no substantive difference between the two cases in that regard. *Id.*

As to the economic burden of the taxes, the Court noted that, once again, there is no difference between this case and *Cotton Petroleum*. In both cases the taxes were paid by the operators, and were not passed on to the tribe. In both cases, a logical argument could be

made that since the very existence of the state taxes makes tribal lands less attractive to lessees, the taxes have an indirect adverse economic impact on the tribe. But, as the Court observed, the Supreme Court rejected this as a valid preemption argument in *Cotton Petroleum*. [Pet. App. 39a-40a].

The Court considered New Mexico's interest in oil and gas operations on Ute lands. Looking to the record, it surveyed New Mexico's ongoing involvement in oil and gas operations on the reservation and the off-reservation oil and gas infrastructure made possible by New Mexico law, the regulation of which is financed by New Mexico taxpayers. The royalties and tribal taxes collected by the Ute Mountain Ute Tribe are calculated on processed oil and gas. The natural gas pipelines and road system coming off the reservation make it possible for the non-tribal taxpayers to turn a profit and for the tribe to maximize its royalty and tax income. The trial court found that "[T]he state provides *substantial* services by regulating the off-reservation infrastructure that makes transport of oil and gas possible" and that "without 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*." [Pet. App. 45a] (emphasis the Court's).

The Court's Opinion faithfully and painstakingly applies *Bracker*, *Ramah* and *Cotton Petroleum* to the undisputed facts in this case.



## I. The Decision Below is Correct.

### A. There Is No Circuit Split.

The Petitioner attempts to construct a "circuit split," [Pet. 19] pointing to *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989). The Petitioner characterizes *Hoopa Valley Tribe* as standing for the proposition that federal trial and appeal courts are "disallowed ... from considering alleged off-reservation state benefits." [Pet. 31]. In *Hoopa Valley Tribe*, though, the burden of the tax fell on the tribe and the court explained that none of the state services in question, "is connected with the timber activities directly affected by the tax. To be valid, the California tax must bear some relationship to the activity being taxed." 881 F.2d at 661.

Thus, as the *Hoopa Valley Tribe* court pointed out, that case lined up with *Ramah* and *Bracker*, and not with *Cotton Petroleum*. 881 F.2d at 660. The Tenth Circuit's application of *Cotton Petroleum* to the case at bar, where the facts are identical, *i.e.*, where the New Mexico severance taxes, to say the least, bear a relationship to the activity being taxed, does not create a circuit split.

The other two citations offered by the Petitioner are not on point. In both instances the Petitioner criticizes the courts for failing to apply *Cotton Petroleum's* "particularized inquiry." *Oklahoma Tax Comm'n v. City Vending of Muskogee*, 835 P.2d 97 (Okla. 1992), *cert. denied*, 506 U.S. 1001 (1992); *Texaco, Inc. v. San Juan County*, 869 P.2d 942 (Utah 1994). Whether this

is so is unknown, since neither decision was reviewed by a higher court. It is always possible that some court, somewhere, has failed to apply *Cotton Petroleum* correctly. The only salient question for present purposes is whether the Tenth Circuit did so below. The Tenth Circuit made the requisite particularized inquiry in the instant action, in exquisite detail.

### B. The Majority Did Not "Overturn" Any of the District Court's Findings of Fact.

The Petitioner contends that the appellate court "overturned" or "rejected" certain findings of fact which had been made by the trial court. This is incorrect. The District Court chose to articulate its conclusions of law in narrative format. The judge correctly characterized his rulings on the issues of economic burden and exclusivity of federal regulations as conclusions of law. *See* the District Court's Findings of Fact, Conclusions of Law and Memorandum Opinion, [Pet. App. 100a].

Whether the relevant federal regulations are "exclusive" is a question of law. It is based on a comparison of the facts unique to a given case with the federal and state laws and regulations in play. In *Ramah*, the federal regulations were exclusive because there was no evidence that the state had any involvement or interest in the construction project in question, a legal inquiry. The same is true of *Bracker*. In both cases this Court concluded, as a matter of law,



that the state had no interest in the matters at hand, leaving only the federal government on the field. Thus, unlike here, the federal regulations were "exclusive." In *Cotton Petroleum*, New Mexico demonstrated its interest in oil and gas operations on Indian land. This Court concluded that the federal regulations were not exclusive. 490 U.S. at 185-86.

In the instant case the question of exclusivity came to the Court of Appeals *de novo*. [Pet. App. 37a, n. 28] [" . . . 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*."]

Nor did the Appeals Court "reject" the trial court's finding that the New Mexico taxes impose an economic burden on the tribe. It accepted that finding and explained why it has no legal significance. In his dissent, Judge Lucero wrote that "the expert opinion proffered by the tribe and adopted by the District Court is sufficient to distinguish this case from *Cotton Petroleum*." [Pet. App. 56a-57a]. But the tribe's expert only testified that the five taxes, in and of themselves, impose a burden on the tribe. The District Court so found, but was careful to separate this finding from

its legal analysis (its conclusions of law), which followed. *See* the District Court's Finding of Fact No. 310, [Pet. App. 100a]. The fact that the five taxes impose an indirect burden on the tribe is inevitable and indisputable. As the court below noted, this was carefully analyzed in *Cotton Petroleum*:

> 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.

[Pet. App. 39a-40a].

The Tenth Circuit did not set aside the expert's testimony or the trial court's findings of fact. It held that the economic burden identified by the expert, and by the District Court, fails to cross the *Cotton Petroleum* threshold, for the same reason it failed to do so in *Cotton Petroleum*. It was for the expert to quantify the burden. It was for the Court to apply the law to that quantification, bearing in mind that these taxes are paid by the non-tribal taxpayers and are not passed on to the tribe, just as in *Cotton Petroleum*.

The Court did not reject the District Court's finding that the state's on-reservation services are *de minimus*. That finding was not challenged on appeal and was noted in the Court's decision. [Pet. App. 40a-41a]. The Court found legal significance in the District Court's uncontested findings that the services provided by the state include "a hearing process for resolving disputes between operators, publicly available geologic records, publicly available productions records, and records of sales and transfers," as well as

"plugging of abandoned wells" and "environmental cleanup and site inspection." [Pet. App. 44a]. It found additional legal significance in the trial court's findings that the state "provides ***substantial*** services by regulating the off-reservation infrastructure that makes transport of oil and gas possible" and "without 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***." [Pet. App. 45a] (emphasis the Court's).

The preemption analysis laid out in *Bracker*, *Ramah* and *Cotton Petroleum* is a legal exercise, one which the Circuit Court was required to apply in its review of the Trial Court's decision. *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1204 (10th Cir. 2009). The applicable test was applied correctly by the Court of Appeals.

### C. The Court Faithfully Applied the *Bracker* Test.

#### 1. The Court's Economic Burden Analysis Does Not Conflict with Supreme Court Precedent.

The Petitioner contends that the Court's economic burden analysis conflicts with the test set forth by the Supreme Court in *Bracker*, *Ramah*, and *Montana*. Each of these decisions pre-dates *Cotton Petroleum*, and, as relevant, each is subsumed in *Cotton Petroleum*. In any event, there is no conflict.



In *Cotton Petroleum*, the Supreme Court acknowledged that any degree of state taxation of non-member operators will have an adverse economic impact on the tribe. The court went on, however, to explain that the impact of the state taxes was indirect, and too remote to constitute a legally-cognizable economic burden. 490 U.S. at 186-87. In making this point, the Court distinguished *Bracker*, *Ramah* and *Montana*, the very cases Petitioner contends are controlling. 490 U.S. at 183-87.

The *Cotton Petroleum* court distinguished *Montana*, pointing out that the taxes at issue there were "extraordinarily high . . . more than twice that of any other state's coal taxes." The Montana taxes were so high, in fact, that they had a negative effect on the marketability of coal produced in the state of Montana. 490 U.S. at 187. If the Tenth Circuit had held that *Montana* is somehow controlling, it would have been ignoring *Cotton Petroleum* in the process.

In *Ramah* and *Bracker*, the economic burden on the tribes was obvious. The state taxes in those cases were ultimately paid by the tribes. The *Cotton Petroleum* court emphasized that "it is important to keep in mind that the primary burden of the state taxation falls on the non-Indian taxpayers." 490 U.S. at 187.

The Tenth Circuit did not "concoct" a new categorical federal preemption analysis. It correctly applied the test handed down by this Court in *Cotton Petroleum*.

### 2. The Court's Consideration of Off-Reservation Benefit Does Not Contradict *Ramah*.

In *Ramah*, New Mexico argued that since it provided services to the Navajo Nation's contractor all around the state, this provided the necessary nexus to avoid preemption of its gross receipts tax. This Court made the obvious observation – preemption analysis is application-specific. While the state could assess its tax on the contractor for monies received in areas where there was state involvement, this does not bleed over onto situations where the state has no interest or involvement. 458 U.S. at 843-44. The Circuit Court in the instant case correctly noted that *Ramah* does not bar the consideration of off-reservation services provided to non-Indian taxpayers as the predicate for taxes imposed on on-reservation activity. [Pet. App. 43a-46a].

This Court has consistently pointed out the significance of the distinction between state taxes which ultimately fall on the tribes and those that do not. In *Ramah*, the Court linked off-reservation services to state taxes falling ultimately on the Indian tribe: " . . . [B]ecause the economic burden [in *Ramah*] ultimately fell ***on the tribe***, the services that the state provided ***to the contractor*** for activity ***off the reservation*** were not a sufficient justification." [Pet. App. 47a] (emphasis the Court's).

The preemption test is, of necessity, a flexible one, to be applied on a case by case basis. *Bracker*, 448



U.S. at 136. There is a flowing dynamic in oil and gas operations on Ute tribal lands, beginning on the reservation and ending off of it, in New Mexico. The trial court found that New Mexico makes a substantial contribution to the value gained by the taxpayers and the tribe from these minerals. [Pet. App. 45a]. The *Cotton Petroleum* court noted that "the relevant services provided by the state include those that are available to the lessees and the members of the tribe off the reservation as well as on it." 490 U.S. at 189 (emphasis added).

Citing *Bracker* and *Ramah*, the Court in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) said "the 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." 462 U.S. at 336 (emphasis added). In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980), the court said that the state's legitimate interest in raising revenues is strongest when the tax is directed at off-reservation value (as it is here) and when the taxpayer(s) are the recipient of state services (as they are here). 477 U.S. at 156-57. *See*, *also*, *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008) [court declines to limit *Bracker* analysis to on-reservation transactions when economic reality extends beyond the reservation]. And *see* the Circuit Court's discussion at Pet. App. 48a-49a.

It would have constituted error for the Circuit Court to hammer *Ramah's* square peg into *Cotton Petroleum's* round hole, especially in light of the particularized facts of this case and *Cotton Petroleum's* express analysis of this very question.

The Petitioner's "extraterritorial taxation" argument is strained, to say the least. All of the relevant activities in this case took place in New Mexico. The portion of the Ute Mountain Ute reservation where the oil and gas are extracted is in New Mexico. The oil and gas is transported off of the reservation in New Mexico, to refineries in New Mexico, without ever leaving New Mexico. The means of carrying the crude substances to the refineries would not be available but for the infrastructure provided by the state. The oil and gas would be without meaningful value if not rendered marketable in the refining process. No other state is involved. No jurist could read the Court of Appeals' decision and come away with the impression that it somehow opens the door to extraterritorial application of a given state's tax laws. As has been seen, this Court has explained that the salient considerations include the off-reservation services afforded the operators by the state. *Cotton Petroleum*, 490 U.S. at 189.



### 3. The Court Did Not Diminish the Role of Federal Oil and Gas Regulations.

In *Cotton Petroleum*, this Court said that the federal oil and gas regulations were "extensive but not exclusive." 490 U.S. at 185. That was in 1989. Since 1989, there have been updates of these federal regulations, but no substantive growth in them. The federal regulatory scheme is no different today than it was when *Cotton Petroleum* was decided. [Pet. App. 36a-37a].

An obvious question presented itself to the Tenth Circuit Court: if the federal regulations were not sufficiently pervasive to trigger federal preemption of state taxes assessed against, and paid by, the non-tribal operators in *Cotton Petroleum*, how could they be so in the instant case? The court cannot be said to have extended the federal government's permissive use of state regulations beyond *Cotton Petroleum* when those usages have remained constant.

The cooperative regulatory relationship between BLM and NMOCD is the same in this case as it was in *Cotton Petroleum*. As the court below observed, Justice Blackman made reference to that relationship in his dissenting opinion in *Cotton Petroleum*. [Pet. App. 34a]. Once again, the practicality of the pre-emption test shows itself. In both *Cotton Petroleum* and this case, BLM had ultimate responsibility for the regulation of operations on tribal lands, but shared that responsibility with the state in a number of

different ways. [Pet. App. 34a-37a]. Hence, here, as in *Cotton Petroleum*, the federal regulations were extensive, but not exclusive. [Pet. App. 37a].

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN B. POUND
LONG, POUND & KOMER, P.A.
2200 Brothers Road
P.O. Box 5098
Santa Fe, NM 87502-5098
505-982-8405
505-982-8513 (FAX)
lpk@nm.net
*Attorneys for Respondent*

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