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 A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE COUNCIL OF ENERGY RESOURCE TRIBES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Diandra D. Benally
Counsel of Record
Assistant General Counsel
Fort McDowell Yavapai Nation
P.O. Box 17779
Fountain Hills, AZ 85269
480-789-7113
480-789-7249 (FAX)
DBenally@FTMCDOWELL.ORG

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INTEREST OF THE *AMICUS CURIAE*

The Council of Energy Resource Tribes ("CERT") is a Denver based non-profit league of Indian Nations, founded with the intent of providing advice and support to Tribes developing and sustaining long-term energy goals. CERT represents fifty-seven energy producing Indian Tribes and Nations. The Ute Mountain Ute Tribe is one of CERT's founding members. CERT's members account for roughly sixty percent of all Native Americans living on Indian lands in the United States.

CERT's mission is to strengthen tribal self-determination and economic growth through traditional and renewable energy development. Since its inception in 1975, CERT has been directly involved in the public policy-making process relating to federal mining and mineral-leasing on Indian lands, environmental regulation, energy taxation, and related jurisdictional issues at the federal, state, and tribal levels. Member Tribes manage all aspects of their resource development. Tribes negotiate agreements, implement environmental protection measures, and manage their revenue and royalty payments.

CERT and its members are affected by any decision relating to the taxation of energy companies doing business on Indian reservations and lands because taxation of those companies affects resource development. CERT has an interest in the preemption of New Mexico's taxes in this case in order to further self-determination for the Ute

Mountain Ute Tribe, one of its member tribes. Further, CERT has a substantial interest in Supreme Court interpretation of Federal Indian Policy. If the Court grants the Tribe's petition for certiorari, all CERT members will have an interest in the outcome.

Issues Presented

I. Are the Five Taxes Imposed by the State of New Mexico on Resources Extracted from Within the Ute Mountain Ute Reservation Preempted by Federal Law Because New Mexico has a Marginal and Indirect State Interest and The Taxes Impose a Substantial Burden on the Ute Mountain Ute Tribe?

II. Does Current Federal Indian Policy Require Preemption In This Case Because the Legislative and Executive Branches Have Expressed a Clear and Unambiguous Intent to Promote Tribal Self-Determination and the Taxes Imposed by New Mexico on the Ute Mountain Ute Reservation Directly Conflict with and Inhibit this Goal?

Summary of the Argument

The Supreme Court should grant the Ute Mountain Ute Tribe's Petition for Certiorari for two reasons, both centering on the fact that the Ute Mountain Ute Tribe has a right and a responsibility to self-determination. First, the Tenth Circuit erred in its Federal Indian preemption law application when it refused to preempt five New Mexico taxes imposed on resource extraction from the Ute Mountain Ute Reservation. Second, the Court should grant certiorari in order to address the disconnect between the clear Federal Indian policy of self-determination expressed by the legislative and executive branches and the judicial decisions which run contrary to that policy. This disconnect inhibits tribal self-determination. Recent decades have undeniably involved a severe policy shift toward tribal self-determination and courts have followed suit.

The Tenth Circuit erred in two respects in its preemption analysis for New Mexico State taxation on the Ute Mountain Ute Reservation. The Tenth Circuit erred in finding that the Tribe did not bear the burden of New Mexico's taxes and in finding that the State of New Mexico had a substantial state interest in imposing taxes. The Supreme Court has developed a preemption test for state taxation on tribal land.[1] The Tenth Circuit applied the

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[1] *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*

appropriate Supreme Court precedent; however, erred in its application and in holding that New Mexico's taxes are not preempted.

The Ute Mountain Ute Tribe established in the trial court that they endure a substantial burden as a result of the five New Mexico taxes enforced on-reservation. The Tribe bears the burden of New Mexico's taxes because it is a deterrent to non-Indian operators wishing to develop on reservation land. The Tribe also suffers a burden because the state taxes imposed inhibit the Tribe's ability to form a tax base by imposing their own taxes of a comparable value to the taxes imposed by New Mexico. The burden on the Ute Mountain Ute Tribe resulting from New Mexico's taxes limits and acts as a barrier to the Tribe's self-determination. This factor of the preemption analysis weighs in favor of invalidating New Mexico's taxes on the Reservation.

The Ute Mountain Ute Tribe also demonstrated that the State has a very minimal and remote interest in applying its taxes to resource extraction on Tribal land. There are no residents, Indian or non-Indian, on the Ute Mountain Ute Tribe's reservation land in New Mexico. In fact the State of New Mexico does not even recognize the Ute Mountain Ute Tribe's presence in the State. The State recognizes twenty-two tribes as present in New Mexico, the Ute Mountain Ute Tribe is not among them. Thus, even where the state refuses to recognize the Tribe's existence within New Mexico's

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of New Mexico, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

borders, and no residents live on the reservation there, the State claims an interest warranting the imposition of taxes. This factor also weighs in favor of the Tribe.

Further, and perhaps most importantly, the Tenth Circuit decision in *Ute Mountain Ute Tribe v. Rodriguez,* 660 F.3d 1177 (10th Cir. 2011) is contrary to repeated express congressional and executive direction and intent to promote tribal self-determination. Congress holds plenary power over the establishment of Federal Indian policy. In holding preemption inappropriate in this case, the Tenth Circuit ignored four decades of stated congressional intent to allow Indian tribes to govern themselves. This general policy should have heavily informed the Tenth Circuit's decision and resulted in the preemption of New Mexico State taxes on the Ute Mountain Ute Reservation.

Throughout United States history, Congress has wavered on its intentions with respect to tribes. However, after many decades of statutes enacted to terminate tribes and the reservation system, Congress, and the federal government in general, has fully embraced the policy of tribal self-determination. In its decision the Tenth Circuit failed to acknowledge this important shift in policy and movement to encourage and facilitate tribal self-determination.

The Ute Mountain Ute's right to tribal self-determination is critical to this case. In order for the Tribe to exercise sovereignty, it needs a tax base. Sovereignty is an empty concept without the actual

ability to carry out basic governmental functions, such as taxation. A tax base would allow the tribe to provide its own services to members, lessening the need for state and federal services. The resources being taxed by New Mexico belong to the Tribe, and are crucial to the Tribe's revenue collection for its members.

Because the Tenth Circuit erred in applying Supreme Court precedent and dismissed forty years of Congressional direction to promote self-determination, the Court should grant the Ute Mountain Ute Tribe's petition for certiorari and reverse the Tenth Circuit's decision.

Argument

I. Preemption of New Mexico State Taxes on the Ute Mountain Ute Reservation is Appropriate in this Case Because New Mexico has Marginal Interests in Taxation On-Reservation and the Ute Mountain Ute Tribe Incurs a Substantial Burden as a Result of These Taxes.

The Tenth Circuit was required to balance the federal regulatory scheme, the burden on the Tribe, and the State's interest in taxing natural resource extraction on reservation land by non-Indian operators. Relying on the Court's decision in *Cotton Petroleum*, which addressed the same taxes, applied to a different Tribe, the Tenth Circuit found this balancing test weighed in favor of New Mexico. This holding is flawed in two respects. The Tribe bears a substantial burden as a result of New Mexico's taxes

and New Mexico does not have a sufficient interest in imposing these taxes.

a. Federal Preemption Law In Indian Country.

The "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. "Laws of the United States" includes federal statutes and regulations which are properly enacted. *City of New York v. F.C.C.*, 486 U.S. 57, 63 (1988). The Supremacy Clause of the Constitution "invalidates all state laws that conflict or interfere with an Act of Congress." *Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986).

This general preemption approach has not been applied in Indian Country because of the unique relationship between Tribes and the federal government. *Warren Trading Post Co v. Arizona Tax Comm'n*, 380 US 685, 688-89 (1965). The Indian preemption doctrine is more liberal than its traditional parallel in that it does not require that preemption was the "clear and manifest purpose of Congress." *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Generally, state laws "are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that Sate laws shall apply." *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 170-71 (1973) (quoting United States Dept. of the Interior, Federal Indian Law 845 (1958). However, the Court has rejected an "inflexible per se

rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987). In the last several decades, courts have consistently held that states have the authority to regulate activities of non-Indians on a reservation. *Id.* at 215; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983).

Federal preemption is especially important in the context of Indian law and policy. The Court has stated the importance of a preemption analysis to "proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216 (citing *Mescalero*, 462 U.S. at 334-35; *Iowa Mutual Co. v. LaPlante*, 480 U.S. 9 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). While courts have consistently mentioned the importance of tribal self-sufficiency, in reality, courts apply a balancing test to determine whether preemption is appropriate, and the test is often applied very narrowly. State law is preempted by federal law if a balance of the federal regulatory scheme, state interests, and tribal interests tips in favor of preemption. *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1186 (10th Cir. 2011). This balancing requires the reviewing court make a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Bracker*, 448 U.S. at 145.

b. **The New Mexico Taxes Impose a Substantial Burden on the Ute Mountain Ute Tribe Because The Taxes Deter Business Development and Inhibit The Tribe's Ability to Develop an Independent Tax Base, Necessary for Self-Determination.**

In a Federal Indian law preemption analysis, the court must balance the federal regulatory scheme, the state's interest in taxing, and the burden on the tribe resulting from the tax. *Ramah*, 458 U.S. at 838. The facts established in the district court are sufficient to demonstrate the burden on the Ute Mountain Ute Tribe, particularly that state taxation on reservation land greatly burdens the Tribe's ability self-govern.

New Mexico's taxation acts as a deterrent to oil and gas business because non-Indian operators face dual taxation on the Reservation. Non-Indian developers considering investments on tribal land are faced with taxation not only by the Tribe, but also New Mexico. The Tenth Circuit held that the negative effects on the Ute Mountain Ute Tribe's ability to attract new leases and raise its own severance taxes were "too indirect and too insubstantial" to constitute a sufficient burden on the Tribe. *See Rodriguez*, 660 F.3d at 1198. However, in his dissent, Judge Lucero points out that "oil and gas production on the Ute Mountain Ute lands would be 'more attractive' to producers without the taxes." *Ute Mountain Ute*, 660 F.3d 1205 (J. Lucero dissenting) (citing *Homans*, 775 F. Supp. 2d at 1274). In negotiating agreements with the Ute Mountain Ute Tribe, operators "take into

account the cost of the five New Mexico taxes in reaching terms" with the Tribe. *Homans*, 775 F. Supp. 2d at 1274. Many of these agreements are negotiated with tax caps for the tribes. *See Id.* at 1275. Presumably, when operators negotiate these tax caps for tribes, they are based, at least in part, on the state taxes which operators know will be imposed regardless.

In this case, New Mexico imposes taxes totaling over 1.3 million dollars per year on non-Indian operators extracting resources from the Ute Mountain Ute Reservation. Producers on-reservation pay a higher amount in taxes than producers off-reservation because they pay tribes taxes too. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 189 (1989) (stating that "the total taxes paid by Cotton are higher than those paid by off-reservation producers"). This results from more than one entity claiming tax jurisdiction on reservation land. *See id.* at 189. Developers on tribal land cannot pass the additional tax burden on to their consumers because the higher tax rates are unrelated to basic supply and demand. Thus, the non-Indian developers have an incentive to work on lands that are not taxed by both a tribe and a state. The Tribe has no real recourse other than to impose lower taxes to keep the overall tax rate reasonable for developers.

Deterring developers directly impedes the Ute Mountain Ute Tribe's ability to attain economic self-sufficiency. Inhibiting tribal economic self-sufficiency runs contrary to Congress's intent of tribal self-determination. *See Montana v. Blackfeet*

Tribe of Indians, 471 U.S. 759, 767 n. 5 (1985) (describing one of the Congress's three goals in implementing the Indian Mineral Leasing Act of 1938 as "ensur[ing] that the Indians receive the greatest return from their property"); H.R.Rep. No. 97 746, at 4 (1982) (stating one of the purposes of the Indian Mineral Development Act of 1982's purposes: "to give Tribes greater return on their resources and enhance their self-determination by giving them greater flexibility in negotiating mineral development agreements"); *see also infra* Part II. State taxation on reservation land deters business development and is wholly inconsistent with Congress's stated goals.

Tribes' ability to impose taxes in order to generate revenue to provide services for members is a vital component to self-determination. A tax base would allow tribes to provide their own social programs, education, housing, and health care, thus, reducing tribal dependence on federal and state programs for these services. In the House Report accompanying the Indian Financing Act of 1974, Congress stated that in order for Indian tribes to become self-sufficient, economic development must be 'facilitated.' *See* H.R. Rep. No. 93-907, at 6-7 (1974).

Here, New Mexico's taxes impose a burden beyond the economic aspect alone. Those taxes pose as a barrier to the Ute Mountain Ute Tribe creating its own tax base with which it can provide a number of benefits to members and non-Indian operators on-reservation. In cases where the Tribe's activities were important to generating funds for necessary

tribal services and on-reservation activities, the Court has found preemption appropriate. *See Cabazon*, 480 U.S. at 220 ("the Cabazon and Morongo Bands are generating value on the reservations through activities in which they have a substantial interest"); *Mescalero*, 462 U.S. at 341 (taking into account the tribe's need to generate money for essential tribal services and employment creation).

The Tribe's natural resources are the only major possibility for generating revenue. In *Bracker* where a state tax amounted to less than 1% of total annual profits, the Court held that such a tax would endanger the overriding federal objectives of guaranteeing tribes receipt of the benefits from development and production of their natural resources. *See Bracker*, 448 U.S. at 136. Here, where New Mexico's tax revenue from reservation land exceeds 1.3 million dollars per year, that endangerment is amplified. Each member of the Ute Mountain Ute Tribe has the potential to earn 8% more per capita in the absence of New Mexico's taxes. This is a clear and substantial economic burden placed directly on the Tribe.

c. New Mexico Does Not have an Interest in Taxing On-Reservation Activities Because The Services Provided are Marginal, Could be Provided by the Tribe and Non-Indian Operators, and Other States have Opted Not to Impose Such Taxes Without Experiencing a Negative Impact.

The Tenth Circuit also focused on New Mexico's interest in imposing these taxes. *Rodriguez*, 660 F.3d at 1198. The State's interest is minimal, as discussed above. However, more importantly, to further self-determination, the Tribe should have the opportunity to provide these minimal services provided for themselves. In this case, the point is moot, because neither the Tribe, nor the non-Indian contractors utilized the State's alleged services, i.e., its dispute resolution process or its well-capping service. In general though, promoting self-determination and self-government requires states to stop forcing their agenda on tribes.

The Ute Mountain Ute Tribe's relationship with the State of Colorado demonstrates a successful divestiture of state power over Tribal resources. In Colorado, the state does not impose taxes like the ones at issue here. There, the Ute Mountain Ute Tribe and the state entered into agreements that preclude the state from imposing such taxes and in return the Tribe pays the state for services it provides. Further, in Colorado, where the state does not impose these taxes, considerably more services are provided directly by the state because the Tribe actually has members living within the boundaries of Colorado, as opposed to its uninhabited reservation land in New Mexico. Even with the services, such as education and health care access, the state is not heavily burdened in the absence of such taxes. Clearly, if the State of Colorado does not deem taxes of this nature to be essential, where it provides direct services, the taxes are not vital to the success of the services provided in New Mexico.

There are other ways in which New Mexico can recoup itself for services provided off-reservation.

It is interesting that the State even claims an interest in this case. New Mexico recognizes the presence of twenty-two tribes within the State's boundaries. The Ute Mountain Ute Tribe is not one of those twenty-two tribes. New Mexico, and in fact the other tribes within the state's boundaries, do not acknowledge the Ute Mountain Ute's presence in New Mexico. This stems from the fact that the reservation land at issue is entirely uninhabited. No New Mexico State citizens, or members of the Ute Mountain Ute Tribe reside on the New Mexico portion of the reservation. The state claims it has the right to tax Ute Mountain Ute Reservation without even acknowledging the Tribe's presence. The land is held in trust for the Tribe by the federal government. There are no state roads or regulatory influence. The only roads on the reservation were constructed by oil and gas operators. *Homans*, 775 F. Supp. 2d at 1265.

Despite New Mexico denying the Tribe's presence in the state, providing no direct services, and the Tribe's general rejected of the indirect services provided by the state, the Tenth Circuit erred in finding that New Mexico had a substantial interest in imposing taxes on resource extraction on the Ute Mountain Ute Reservation.

II. Current Federal Indian Law and Policy Require the Preemption of the Five Taxes Imposed by New Mexico on the Ute Mountain Ute Reservation Because the

Taxes are Inconsistent and In Opposition to Explicit Intent from Congress to Promote Tribal Self-Determination.

The Supreme Court has stressed the importance of federal policy in the Federal Indian preemption analysis. Rather than using preemption doctrines from other areas of law, the inquiry is governed by "the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development." *Ramah*, 458 U.S. at 838. Statutes Congress has passed for the benefit of Indians must be construed in favor of the tribes; and where ambiguous, the statute should be interpreted in a manner which benefits the tribes. *McClanahan*, 411 U.S. at 174. The Tenth Circuit's inquiry did not adequately take into account congressional promotion of tribal sovereignty and self-determination.

Under the current Federal policy of self-determination, tribes are expected to develop tribal self-government, self-sufficiency, and economic development. *See California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083, 1092 n.20 (1987) (citing 19 Weekly Comp. of Pres. Doc. 99 (1983) ("It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government.")). State taxation of on-reservation activities is a direct and onerous burden on this charge. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

a. Throughout United States History, Congress has Shifted its Policy With Respect to Indian Affairs A Number of Times, But for the Last Forty Years Has Promoted Tribal Self-Determination.

The Federal Government has, since the 1960s and 1970s, supported a policy of tribal self-determination. The Supreme Court has recognized this policy repeatedly. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) ("We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government."); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n. 5 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980); *Williams v. Lee*, 358 U.S. 217, 220-21 (1959). Of course, this has not always been the case. Federal Indian law policy has had a schizophrenic and tragic history.

At the turn of the century, termination and extermination became the stated Federal policy. The termination era focused on bringing Native American people under state control and dissolving federal responsibility. It is important to note that many court decisions relied upon in preemption cases were decided at this time.

However, by the time President Nixon took office, self-determination was in full force. As stated by the President himself, "[s]elf-determination among the Indian people can and must be encouraged without the threat of eventual

termination." President Nixon, Special Message on Indian Affairs, at 2 (July 8, 1970). Self-determination "must be the goal of any new national policy toward the Indian people to strengthen the Indian's sense of autonomy without threatening his sense of community." *Id.* Since then, the legislative and executive branches have been consistently making statements and enacting legislation to support this approach.

Congress has passed a number of statutes both explicitly and implicitly advocating for tribal self-determination. Some examples of statutes where Congress is explicitly encouraging self-determination are: the Indian Self-Determination and Education Assistance Act;[2] the Native American Housing Assistance and Self-Determination Act;[3] the Indian Financing Act of 1974;[4] the Tribal Government Tax Status Act of 1982;[5] Indian Tribal

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[2] Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. § 450 (2000) ("The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.").

[3] Pub. L. No. 104-330, 110 Stat. 4017 (1996) (codified at 25 U.S.C. § 4101 (2000) (directing the Federal Government to assist in the development of housing financing "to achieve the goals of economic self-sufficiency and self determination for tribes and their members").

[4] 25 U.S.C. § 1451 (2000). In this act, Congress's explicit purpose was to provide reimbursable capital to "help develop and utilize Indian resources . . . to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians. . . ." *Id.*

[5] 26 U.S.C. § 7871 (2000). This act extended tax advantages enjoyed by states to Indian Tribes. *Id.*

Energy Resource Development Act;[6] and the Indian Gaming Regulatory Act.[7]

Other statutes have more implicitly promoted self-determination. A number of environmental statutes include provisions allowing tribes to administer their own programs under 'treatment as a state' ("TAS") provisions. Under the Clean Water Act,[8] the Comprehensive Environmental Response Compensation and Liability Act,[9] the Clean Air Act,[10] and the Safe Drinking Water Act, Tribes are eligible for regulatory program authorizations for treatment as a state.[11] The Southern Mountain Ute Tribe in Colorado, bordering the Ute Mountain Ute reservation in New Mexico, has completed its application and has been approved for treatment as

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[6] 25 U.S.C. § 3502 (2005) ("To assist Indian tribes in the development of energy resources and further the goal of Indian self-determination, the Secretary shall establish and implement an Indian energy resource development program to assist concentrating Indian tribes and tribal energy resource development organizations. . . .").

[7] 25 U.S.C. § 2702(1) (1988) (stating the act's purpose is to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments").

[8] 33 U.S.C. § 1377(e) (2000) (authorizing the Administer to "treat an Indian tribe as a State," which could include "the direct provision of funds").

[9] 42 U.S.C. § 9626(a) (1986) (stating that "[t]he governing body of an Indian tribe shall be afforded substantially the same treatment as a State").

[10] 42 U.S.C. § 7601(d)(1) (1990) (authorizing the Administrator "to treat Indian tribes as States")

[11] For a complete listing of acts with treatment as a state programs where the EPA is the administrator, see http://www.epa.gov/tp/laws/tas.htm.

a state under the Clean Water Act.[12] Other tribes have been approved for treatment as a state under the Clean Air Act.[13] These provisions are being used by tribes as they begin to control more aspects of their tribal governments.

Since President Johnson, the executive branch has echoed Congress's policies of self-determination. In the late 1960s, President Lyndon Johnson announced: "We must affirm [Indian] rights to freedom of choice and self-determination." Lyndon B. Johnson, President, U.S., Message to Congress (Mar. 6, 1968). In the 1970s, President Nixon strongly advocated for self-determination. In 1983, President Reagan stated that it "is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." 19 Weekly Comp. of Pres. Doc. 99 (1983). President Clinton issues executive orders requiring the government to consult with Indian tribes regarding policy changes and new rules. Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998). President Obama has also expressed a desire to continue encouraging tribal independence and self-

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[12] available at http://yosemite.epa.gov/opa/admpress.nsf/e51aa292bac25b0b85257359003d925f/9a225bc89b6477b78525792f006aee22!OpenDocument&Highlight=0,ute,mountain.

[13] For example, the Northern Cheyenne Reservation. *See* EPA Region 8 Tribal Air Quality Programs Clean Air Act Section 103 and 105 Success Stories, Compiled by The Southern Ute Indian Tribe Air Quality Program (2006), available at http://www.utemountainuteenvironmental.org/umep/assets/File/Air/AirQualitySuccessStories.pdf.

determination. See Achieving a Brighter Future for Tribal Nations, 2011 White House Tribal Nations Conference Progress Report (December 2011) (focusing on sustainable economic development, infrastructure development, health care, public safety, and education).

b. Throughout the Era of Self-Determination Courts have Consistently Restrained Tribes from Realizing any of the Benefits of Self-Determination by Allowing States to Exercise Sovereignty on Tribal Land.

While Courts can easily follow the expressed intent of Congress, it is important to review and apply Congress's broader policy-based intentions as well. Congress's has been heavily legislating in the Federal Indian arena since the 1970s. Relevant to the instant case, Congress has expressly and implicitly demonstrated its intent to promote self-determination even after the Supreme Court decisions in *Cotton Petroleum*, *Ramah*, and *Bracker*. While the Court has a duty to follow its precedent under *stare decisis*, the flexible preemption analysis established by the court requires consideration of shifts in congressional policy.

The first Indian preemption cases apply older Supreme Court precedent, which was decided when Congress expressed a diverse, and less evident, policy toward Indian law. *Cotton Petroleum* provides a compelling example. In rejecting "indirect burdens" on the Jicarilla Apache Tribe, the Court

relied on cases decided in 1938, 1943, and 1949.[14] The cases relied on by the Court were decided at a time when Federal Indian Policy was directed termination – not self-determination.

Furthermore, the often cited, judicially-based concern for the Tribes' supposed comparative market advantage should not overcome Congress's direct intention of encouraging economic self-determination in Indian Country. *See Moe v. Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation*, 425 U.S. 463, 483 (1976) (Justice Rehnquist was concerned about businesses avoiding state law by seeking out the "competitive advantage" within the reservation). Of course, this concern is not sufficient to strip tribes of sovereignty. In fact, non-Indian companies would not be going on to reservations to avoid taxes altogether in mining and natural resource development scenarios. Tribes do impose taxes on resource extraction. Thus, there is not an incentive for companies to "flout" state law as Justice Rehnquist warned, rather there is only a

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[14] In excluding indirect burdens from the preemption analysis, the Cotton Petroleum Court relied on *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938), *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949), *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980). While the Court cites to two cases during the "self-determination" era, in those cases, the Court relied on law from the termination era to support the rejection of indirect burdens. In *Moe*, the Court relied on a 1959 case. *Moe*, 425 U.S. at 483 (citing *Williams v. Lee*, 358 U.S. 217, 219-20 (1959). Then, in *Colville*, the Court relied upon *Moe*. *Colville*, 447 U.S. at 159.

typical market choice for companies to decide were to operate to best maximize their profits. If companies feel it is best to extract resources on tribal lands, it is not for the Court to build barriers to that development. It makes no sense whatsoever to impose an additional burden on tribes to protect states from a competitive advantage that is merely speculative and in fact does not exist in the natural resources realm. Specifically, here, the Ute Mountain Ute would likely increase their taxes up to the amount of New Mexico's, resulting in zero competitive advantage over New Mexico. The result would be a tax base, not increased advantages to the non-Indian operators.

c. The Supreme Court Should Grant Certiorari to Clarify Forty Years of Inconsistency Between the Judiciary and Congress With Respect to Indian Affairs.

In granting certiorari, the Court would have the opportunity to create consistency between Congress's explicit intention to allow and encourage tribal self-determination and the frequent barriers to self-determination imposed by courts. After this case, states have a very minimal burden to exercise jurisdiction over activities occurring on wholly tribal land. Rather than promoting tribal self-determination, the Tenth Circuit's decision promotes a vast increase in state authority. With essentially no state interest, other than the fact that the state borders a reservation, and thus goods move through and into the state as a result of tribal development, the state can tax activities on reservation. Tribes, however, have an excessive burden to show that

state taxation of on-reservation activities is not warranted. Because tribes bear such a heavy burden to disprove state authority to tax and states have such a small burden to demonstrate the authority to tax, tribal self-determination is impossible to attain.

Conclusion

For the foregoing reasons, the Council of Energy Resource Tribes respectfully asks the Supreme Court to grant the Ute Mountain Ute Tribe's petition for certiorari in this case.

The Court should grant this petition for certiorari in order to clarify the Court's commitment to aligning itself with the current Federal Indian law policy imposed by Congress and the Executive Branch. The Court should establish precedent that takes into consideration the most recent four decades in Federal Indian policy. The current federal policy with respect to Indians is self-determination. The New Mexico state taxes at issue here are a major impediment to this explicit legislative and executive goal, and are inconsistent with federal law.

CERT asks the Court to grant certiorari and establish a precedent in favor of self-determination. The taxes imposed by New Mexico create a major deterrent to development on tribal land and inhibit the Tribe's ability to develop a tax base. The State does not have any interest in taxing this land, on which there are no residents, because they do not even recognize the Tribe's presence in the State. Because the burden on the Tribe is substantial and

the state interest is de minimis, the Tribe has satisfied the Supreme Court's preemption analysis and New Mexico's taxes should be invalidated.

Respectfully submitted,

Diandra D. Benally
Counsel of Record
Assistant General Counsel
Fort McDowell Yavapai Nation
P.O. Box 17779
Fountain Hills, AZ 85269
480-789-7113
480-789-7249 (FAX)
DBenally@FTMCDOWELL.ORG