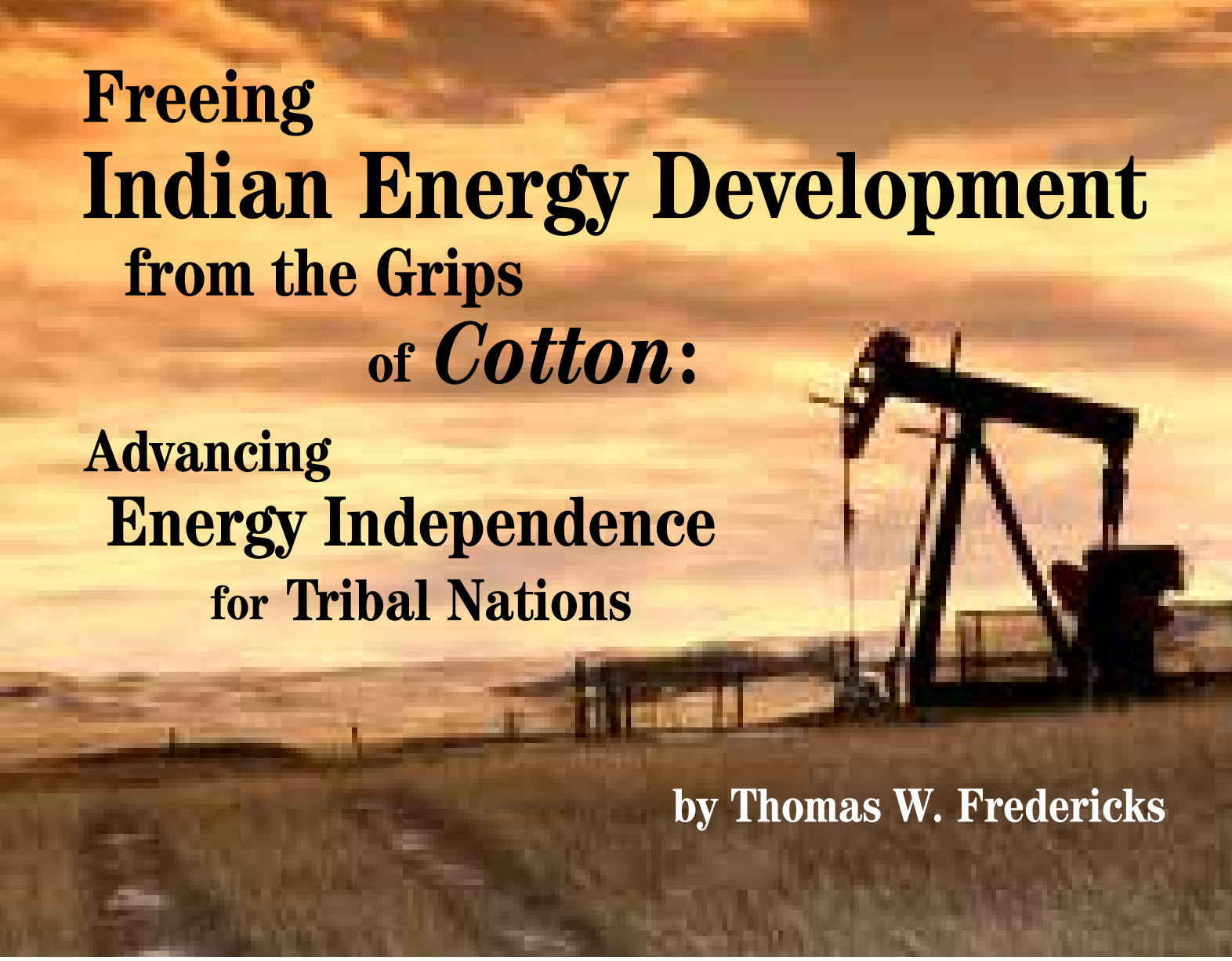

Freeing Indian Energy Development from the Grips of *Cotton*: Advancing Energy Independence for Tribal Nations

by Thomas W. Fredericks

A substantial amount of untapped energy resources are located within Indian country in the United States. Energy production from tribal lands equals 10 percent of the total federal onshore production of energy minerals.[1] Indian-owned energy resources are still largely undeveloped: 1.81 million acres are being explored or in production, but about 15 million more acres of energy resources are undeveloped.[2]

There are over 90 tribes with significant energy resources located within their territories—both non-renewable and renewable in the United States, and it is the goal of many of these tribes to fully develop these resources. Unfortunately, these tribes have quite often not been able to fully realize this goal, and a substantial amount of these energy resources have not been developed because of bureaucratic red tape, physical access limits to pipelines, transmission grids, and the financial capital that would allow tribes to be equal partners in the development of their natural resources. One of the biggest impediments to the development of these resources has been the ongoing state assertion of oil and gas taxes on mineral development occurring within Indian reservations.

Federal statutes regarding Indian oil and gas have evolved to vest tribes with more control of their natural resources and more ownership of the profits from production of Indian minerals. The statutes discussed herein move forward that policy by giving tribes more control of their mineral resources as a tool for economic development and prosperity. This article argues that these federal policies and statutes pre-empt state taxation of Indian minerals.

Further, this article asserts that the Secretary of the Interior has the statutory authority, augmented by his position as trustee for tribal oil and gas, to regulate and limit state taxation of Indian

oil and gas to further the federal policy of empowering tribes to control their own resources and of ensuring that the benefit of valuable Indian resources inure to the tribes. State taxation of Indian minerals interferes with and inhibits tribal autonomy and economic development and the Secretary has the authority and the duty to prevent such interference by regulating state taxation so as to prevent states from taxing Indian minerals at a level that far exceeds the minimal benefits that states provide the tribes and their non-Indian producers.

Background

Current Developments

Since 1985, the U.S. domestic production of oil and gas has increased substantially.[3] This boom is due partly to federal policy regarding public land leases for mineral development,[4] partly to rising oil and gas prices which make it lucrative for producers to extract the minerals, and partly to innovations in extraction and production, such as oil shale development and hydraulic fracturing for natural gas.[5]

A substantial percentage of this boom is occurring on Indian reservations. In order to take advantage of this boom, many Indian tribes have entered into agreements with states and/or individual lessees regarding taxation of mineral leases on reservation lands geared at ensuring that reservation leases remain attractive and competitive with non-reservation leases. These agreements both authorize the tribes to be active lessors of tribal minerals that have a working interest in the production of tribal minerals *and* address industry concerns that the dual taxation—that is, taxation by two sovereign entities, the state and the tribe—will make Indian mineral leases prohibitively expensive. Without these agreements, tribes would have been unable to realize any economic gain from their minerals.

For example, in North Dakota, oil and gas development was occurring all around the Three Affiliated Tribes of the Fort Berthold Reservation (the MHA Nation or Nation), but not within its borders.[6] So, in 2010,[7] in order to avoid dual state and tribal taxes which would deter oil and gas companies from producing the MHA Nation's on-reservation oil and gas, the MHA Nation signed a tax agreement with the state of North Dakota whereby the state and Nation each receive 50 percent of the tax revenues collected from trust lands[8] on-reservation oil and gas production by non-Indian lessees, and the state retains 80 percent of taxes collected from non-trust land oil and gas production within the reservation, and the Nation collects 20 percent of such taxes. The agreement was signed so that the reservation trust lands could enjoy the current oil and gas industry boom in North Dakota.

In 2007, 2008, and 2009, the MHA Nation entered oil and gas agreements with individual companies in which the Nation agreed that all state, federal, and tribal taxes shall not exceed 11 or 11.5 percent throughout the term of the lease. The agreements were authorized by the Indian Mineral Development Act of 1982 (IMDA),[9] a federal statute that enables tribal governments to enter mineral agreements to develop tribal minerals. These tax cap provisions were included in the IMDA agreements to ensure that Indian oil and gas leases remained attractive and competitive with non-Indian oil and gas leases in the same geographic market. Industry was concerned that dual taxation of IMDA agreements—that is, taxation by both a state and a tribal government—would make IMDA agreements less economically feasible than fee leases because of the higher dual tax burden imposed by two governments. By including the tax cap in the agreements, the MHA Nation has limited its taxing authority for the life of the IMDA Agreements.

Like the rest of the United States, North Dakota is now experiencing an oil and gas boom and tribes are being economically over-burdened by the demands of the drastically increasing mineral production.[10] As a result of dramatically increased traffic resulting from the boom, the roads and infrastructure on the reservation that are used by oil and gas industry are rapidly deteriorating.[11] Many of these roads are Bureau of Indian Affairs (BIA) or tribal roads, and these roads are bearing the brunt of wear and tear from on-reservation oil and gas production. The substantial deterioration of these roads is causing dangerous driving conditions for the general public and oil and gas vehicles operated by the industry.

The oil and gas boom requires increased law enforcement to monitor increased traffic and to safeguard, for example, oil and gas equipment. The tribes fund law enforcement along these roads and on the reservation where oil and gas rigs are located and fund other infrastructure necessary to facilitate the oil and gas industry growth, with little help from state monies. The boom also requires other infrastructure such as traffic signals and signs. Further, the tribes' energy regulatory departments and health clinics are being stretched thin by the increased use of both, which is also a result of the oil and gas boom.

For example, in 2011, the state of North Dakota collected more than $75 million from the MHA Nation's energy development. In 2012, North Dakota is expected to collect well over $100 million in oil and gas taxes from the Nation's wells. Of the $75 million in taxes that North Dakota collected from on-reservation oil and gas production in 2011, it spent less than $2 million of that revenue on state roads within the reservation and spent zero dollars on the BIA or tribal roads being impacted. Meanwhile, the Nation uses monies in its general coffers to mitigate damages caused by the energy industry, but these monies are insufficient to keep up with the current pace of wear and tear on tribal roads. Because of the tax caps in the IMDA Agreements, the Nation is unable to increase tribal taxes to cover these impacts.

North Dakota spent zero dollars to mitigate collateral negative impacts of the on-reservation mineral production. Four MHA Nation communities being impacted by mineral development are not eligible to receive state dollars, even though they are impacted by the mineral development occurring in close proximity. The tribes are therefore being asked by these communities to provide funding to cover these impacts.

Scenarios similar to this are occurring throughout the country. The above-listed expenses are the costs of production necessary to facilitate the safe and efficient growth of the oil and gas industry. Nevertheless, the tribes are bearing the vast majority of these costs, while states collect a large percentage of the oil and gas tax revenue and spend very little on the required infrastructure. Because the tax revenue collected on the oil and gas by the tribes is inadequate to keep up with the oil and gas industry growth, the tribes are forced to dip into their general coffers to mitigate the impact of the growth and use funds intended for other governmental services. Currently, the tribes' general funds are inadequate to fund all of this growth.

The inability of the tribes to fund this growth in the absence of increased tax revenue is adding to mineral production costs, slowing

production, endangering lives, and diminishing the governmental services available to tribal members. Although industry is paying taxes that should cover these impacts the wrong sovereign is collecting the majority of the tax revenue.

The Legal Landscape: Statutes and Cases

With the exception of the IMLA, the statutes discussed below are the basis for the assertion that state taxation of Indian oil and gas is pre-empted by federal law and policy.

The IMLA

The first comprehensive legislation to vest the Secretary with the duty of leasing Indian minerals was the Indian Mineral Leasing Act of 1938[12,13](IMLA). The IMLA does not apply to lease of allotted lands,[14] but the U.S. Department of the Interior (DOI) adopted many IMLA provisions for allotment leases.[15] The Secretary has statutory duties with regard to IMLA leases.[16] For example, the Secretary can ensure that lessees are complying with federal regulation and conditions of a lease and cancel a lease if the lessee fails to comply with either.[17]

States were initially allowed to tax IMLA mineral leases, but in 1977 the DOI solicitor determined that the states were not authorized by the IMLA to tax IMLA leases.[18] "Then, in 1985, the United States Supreme Court resolved the issue … [and] held that states could not tax Indians or Indian tribes on the mineral production from Indian lands." [19]

Recently, however, judicial doctrine shifted in favor of allowing states to tax non-Indian production.[20] In 1989, the U.S. Supreme Court held that IMLA does not require the Secretary to maximize the return for Indian oil and gas[21] and allows states to tax non-Indian producers on Indian lands. While the Supreme Court reasoned that IMLA does not require the Secretary to maximize the return for Indian oil and gas, this analysis is impacted by the development of new federal legislation that is discussed below.

The IMDA

In 1982, the U.S. Congress passed the Indian Mineral Development Act,[22] (IMDA), again vesting the Secretary with comprehensive management duties for Indian oil and gas development. One purpose driving the IMDA was to allow tribes to enter agreements whereby the tribes could hold a working interest mineral production interest.[23] That is, the IMDA was aimed at transitioning tribes from the role of passive lessors to active participants in the production of their own Indian minerals.

The IMDA accomplished this by authorizing mineral agreements whereby tribes could share in the profits and other revenues of mineral production, and not just share through collecting royalties from leases. The IMDA has resulted not only in agreements whereby tribes are partners in tribal mineral production, but recently tribes have created tribal corporations that extract and produce Indian oil and gas. For example, the Southern Utes, the Ute Indian Tribe of Utah, the Navajo Nation and the MHA Nation have tribal companies that produce and develop oil and gas. These tribal companies allow the tribes to participate in the working interest of the oil and gas wells as well as receiving royalty and tax payments.

The clearly stated purpose of the IMDA is to maximize the economic return to a tribe for its oil and gas and the Secretary is expressly authorized to promulgate regulations to implement the IMDA. Congress expressly stated that one of the IMDA's two objectives is "to *maximize the financial return* tribes can expect from their valuable mineral resources."[24] The Secretary acknowledged this maximization goal in IMDA regulations:

> These regulations are intended to ensure that Indian mineral owners are permitted to enter into minerals agreements that will allow the Indian mineral owners to … allow development in the manner which the Indian mineral owners believe will *maximize* their best economic interest.[25]

Under the IMDA "any Indian tribe, subject to the approval of the Secretary … may enter into any … agreement … providing for … the extraction, processing, or other development" of its oil and gas.[26] The IMDA authorizes tribes to enter negotiated mineral agreements, including leases,[27] but preserves the ability of tribes to enter IMLA leases.[28] IMDA leases may reach an individual allottee's oil and gas:

> Mineral agreements are available for all mineral resources in which the tribe "owns a beneficial or restricted interest";

thus, the IMDA reaches the *tribal* mineral estate reserved under allotted or off-reservation lands. Moreover, mineral resources belonging to *allottees* may be included in a tribal agreement, subject to the concurrence of the parties and a finding by the Secretary of Interior that the participation in the tribal agreement is in the best interest of the allottee.[29]

The IMDA directed the Secretary to review the terms of all mineral agreements, which do not purport to be leases, entered into by tribes and approved after 1974, to determine whether any modifications were necessary to bring those agreements into compliance with the IMDA.[30] Thus, non-IMDA mineral agreements can be required to comply with IMDA rules and regulations.

The IMDA also requires that the Secretary determine whether an agreement's anticipated social, cultural, or environmental impacts to the mineral owner outweigh the benefits to the mineral owner.[31] Thus, the Secretary must consider the costs and any adverse collateral impact of an IMDA agreement on the tribe.

The Secretary has express statutory authority to promulgate regulations to facilitate the implementation of the IMDA.[32] The IMDA "regulations extend the Secretary's duty to *any administrative action* that affects the interests of the tribe as mineral owner."[33] Further, pursuant to the IMDA, the Secretary may regulate *any agreement* regarding the development of tribal oil and gas; therefore, if a state and a tribe have a tax agreement that burdens Indian oil and gas development, or increases the tribe's expenses related to the extraction of oil and gas, then the Secretary may regulate such agreement because the agreement impacts whether the tribe can maximize the return for its minerals.

The IMDA provides the Secretary with broad oversight of Indian oil and gas development, including allottee minerals if such minerals are made part of a tribal agreement, and requires that the Secretary consider the collateral impacts of energy development. Thus, where energy development expenses are depleting the tribes' general coffers and causing deterioration of the tribes' infrastructure—both collateral impacts of the oil and gas boom—the Secretary may act to mitigate this impact on the tribes by regulating the tribal state tax agreements to assure a fair allocation between the two sovereigns to meet the impacts as well as making sure the mineral owners are getting maximum benefits from the development.

FOGRMA and ITEDSDA

Also in 1982, Congress enacted the Federal Oil and Gas Royalty Management Act,[34] (FOGRMA), which covers federal, tribal, and allotted Indian lands. FOGRMA was enacted to improve the federal government's collection of mineral royalties and was "designed in part to meet the trust responsibility to the tribes."[35] FOGRMA regulations also state the Secretary's regulations should be developed to ensure a maximum return to the Indian mineral owner:

> These regulations are applicable to lands or interests in lands the title to which is held, for any *individual Indian*, in trust by the United States or is subject to restriction against alienation imposed by the United States. These regulations are intended to ensure that Indian mineral owners desiring to have their resources developed are assured that they will be developed in a manner that *maximizes* their best economic interests.[36]

In 1992[37] (Indian Energy Resources Act of 1992), and again in 2005[38] (Indian Tribal Energy Development and Self-Determination Act of 2005 (ITEDSDA)), Congress passed comprehensive energy legislation regarding tribal energy development. ITEDSDA regulations apply to Indian oil and gas.[39] Pursuant to the ITEDSDA, tribes can enter lease or business agreements to develop energy on tribal lands[40] and secretarially-approved tribal energy resource agreements (TERA) *governing* ITEDSDA leases and business agreements.[41] A business agreement includes any agreement that "furthers any activity related to locating, producing, transporting, or marketing energy resources on tribal land," and any modifications, supplements, or amendments thereto.[42] A TERA must include provisions that with respect to a lease or business agreement, "address the *economic return* to an Indian tribe" under a lease or business agreement.[43] Under ITEDSDA, the Secretary must protect Indian trust assets against violations of federal law when such conduct arises under a TERA, especially if the violation results in imminent jeopardy to a physical trust asset.[44]

ITEDSDA reflects the government's overarching concern with the profitability of Indian minerals and an acknowledgement that mineral development could endanger and degrade other trust assets, such as tribal roads.

Onshore Oil and Gas Operation Regulations

Pursuant to federal regulation,[45] general regulations (Onshore Oil and Gas Regulations) governing onshore oil and gas operations[46] supplement regulations governing Indian oil and gas development. These supplemental regulations grant the Secretary the authority to regulate every aspect of oil and gas development by regulating oil and gas well operators. Specifically, operators are required to conduct mineral extraction in a manner that avoids undue damage to other natural resources, surface resources,[47] and in a manner

> which protects life and property; and which results in maximum ultimate economic recovery of oil and gas with minimum waste and with minimum adverse effect on ultimate recovery of other mineral resources.[48]

Together, IMDA, FOGRMA, ITEDSDA, and the Onshore Oil and Gas Regulations, vest the Secretary with comprehensive management duties over Indian oil and gas development and require that the Secretary exercise his authority to maximize the economic return for Indian minerals. The IMDA expressly authorizes the Secretary to regulate in order to implement IMDA's purpose, which is to maximize the financial return to a tribal mineral owner for tribal minerals. Further, pursuant to ITEDSDA and the Onshore Oil and Gas Regulations, the Secretary is required to protect other physical tribal trust assets, like reservation infrastructure, from the negative impacts of tribal energy development. Therefore, the Secretary can regulate to ensure that such roads are receiving adequate funding to be safely maintained.

Cases

Three Supreme Court cases inform the analysis of whether a state tax imposed on non-Indian lessors extracting Indian minerals is appropriate. Each is discussed in turn below.

In *Cotton Petroleum Corp. v. New Mexico*, a mineral devel-

oper challenged a state's ability to levy taxes on its on-reservation production under IMLA leases and the Supreme Court addressed whether a state's authority to tax Indian oil was pre-empted by the IMLA and its policy of guaranteeing Indian tribes the "maximum return on their oil and gas leases."[49] The *Cotton* Court first interpreted IMLA and determined that IMLA's purpose was not to *maximize* profits for Indian oil and gas, [50] therefore there was no implied prohibition of state taxation. It then analyzed the state, federal, and tribal interests and determined that (1) the state had an interest in on-reservation oil and gas production because the state provided services and funding to on-reservation lessees and the tribe[51]; (2) because the state's tax did not prohibit the tribe from raising tribal taxes, it therefore did not burden the tribe[52]; and (3) the federal regulatory scheme governing on-reservation oil and gas production was comprehensive, but not exclusive, because the state regulated spacing and mechanical requirements for wells located on the reservation.[53] Thus, because the IMLA's purpose was not to maximize the tribe's profit, the state had some interest in the on-reservation activity, the tribe was not burdened because it could raise taxes, and the federal regulatory scheme was not exclusive, then the state tax was not pre-empted by federal law.[54]

The *Cotton* Court then took up the issue of whether the state's tax violated the U.S. Commerce Clause by imposing an "unlawful multiple tax burden on interstate commerce."[55] It reasoned that the federal government, the state, and the tribe had concurrent taxing jurisdiction over the lessee and that "[t]he federal sovereign has the undoubted power to prohibit taxation of the Tribe's lessees by the Tribe, by the State or by both, but since it has not exercised that power, concurrent taxing jurisdiction over all of Cotton's on-reservation leases exists."[56]

In *White Mountain Apache v. Bracker*,[57] a non-Indian logging company operating on an Indian reservation challenged a state's ability to impose state taxes on its on-reservation logging activity.[58] The state taxes were intended to compensate the state for the use of state highways that were located on the reservation.[59] The logging company conceded its liability for the use of state highways within the reservation, kept records of its use and travel of state highways, and allocated a portion of its taxable gross receipts to compensate the state for such use.[60] The *Bracker* Court considered whether the state tax was pre-empted by federal law and found that it was.[61]

The *Bracker* Court found the federal and tribal regulatory scheme governing Indian timber so pervasive that it precluded the additional burden of state taxes.[62] The Court began its analysis by stating that the broad federal policy of promoting tribal self-sufficiency and economic development is the backdrop for an analysis of whether a state tax is pre-empted by federal law.[63]

The Court then determined that the federal government's regulation of logging on reservations was comprehensive and was codified in various acts of Congress and detailed regulations promulgated by the Secretary of the Interior, and daily supervision of logging activity by the BIA.[64] The federal government was involved in almost every aspect of marketing and production of Indian timber.[65] Factors relevant to whether the Secretary has comprehensive authority over logging on reservation land included: broad authority over the sale of timber where timber may not be sold without the consent of the Secretary; the Secretary's control and responsibility for the proceeds from tribal timber sales; that the Secretary must consider specific, statutorily mandated factors when determining whether a timber sale is in the tribe's best interest; the Secretary's authority to regulate Indian forest units[66]; and the BIA's approval authority for timber logging contracts, and its authority to decide how much timber would be cut and which roads could be used to haul timber.[67] The Secretary also promulgated regulations governing the BIA roads, administered, repaired, and maintained the roads with contributions from, and through contracts with, the tribes and with federal dollars.[68]

The *Bracker* Court held that the state had no regulatory interest in the on-reservation logging activity because it did not regulate on-reservation logging activity or provide any services to the logging industry.[69] Because the reimbursement for use of state roads had been conceded and paid, the Court reasoned "this is not a case in which the State seeks to assess taxes *in return for governmental functions it performs* for those on whom the taxes fall"[70] clearly indicating that the Court considered the validity of the state tax dependent on the value of the governmental services the state provides to support the taxed activity.

The consequences of the* Cotton *Court's holding that general and off-reservation services can justify a state's tax of on-reservation services is that a state will always have an interest sufficient to justify its tax of on-reservation activity, so long as the state provides any services whatsoever to a tribe. This negates the fact-specific inquiry required by the pre-emption analysis. The* Rodriguez *court clearly reflected this consequence where it held that the off-reservation state roads and pipelines used to carry reservation oil and gas was the "more important" state service that 'primarily justifies the [state] tax at issue."Thus, because of* Cotton *and* Rodriguez*, it is unclear whether the services provided off-reservation and general services provided to tribes can justify a state interest in the activity regulated.

The *Bracker* Court held that economic burden of the asserted taxes would ultimately fall on the tribe.[71] It reasoned that state taxes would adversely affect the tribe's ability to comply with management requirements because the tribe had to spend money to comply with such requirements, tribal money was derived from tribal revenue from timber sales, and state taxes would diminish amounts of timber revenues and leave the tribes with reduced sums with which to pay federally required expenses.[72]

The Court concluded that state taxes would obstruct the policy underlying the federal laws regarding Indian timber, which was to guarantee that Indians would receive the benefit of whatever profit the tribal forest was capable of yielding.[73] It reasoned that such federal policy to ensure that profits derived from timber sales inured to the benefit of the tribe was subject only to expenses incurred by the *federal government*.[74]

In *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*,[75] the Supreme Court addressed whether a state could tax the gross receipts of a non-Indian construction company building a school for Indian children on the tribe's reservation. The Court found that pursuant to *Bracker*, the state tax was pre-empted.[76]

In *Ramah*, the state closed the only high school near the reservation and so the tribe established a Tribal School Board and built its own high school using BIA and congressional funds.[77] The board was the contractor for the construction of the high school, but could subcontract construction work to third parties and such contracts were subject to BIA approval.[78] The subcontractor paid state gross receipts taxes and was reimbursed for such taxes by the tribe, and both the tribe and the contractor challenged the validity of the state tax.[79]

The *Ramah* Court noted that a "state's interests in exercising its regulatory authority over the activity in question must be examined and given appropriate weight."[80] In analyzing the federal interest, the *Ramah* Court reasoned that like *Bracker* where federal regulation of the timber industry was pervasive and comprehensive, federal regulation regarding Indian educational institutions is pervasive and comprehensive.[81] Like in *Bracker* where the BIA extensively regulated contractual relationships between the Indians and non-Indian loggers,[82] in *Ramah*, the BIA had wide-ranging authority to review the contracts between the board and non-Indian subcontractors, to monitor the construction site, and to require certain contract clauses.[83]

Further, the Court held that the federal policy of promoting tribal self-sufficiency in the area of education also precluded the state tax of activity related to Indian education on an Indian reservation.[84] It reasoned that the federal policy of promoting tribal self-sufficiency in education is reflected in numerous statutes empowering the BIA to provide for Indian education and in the policy shift toward encouraging the development of Indian-controlled institutions on the reservation, as reflected, for example, by the Indian Self-Determination Act.[85]

Finally, the *Ramah* Court acknowledged that there is a broad federal policy of encouraging tribal sovereignty and economic development and tribal self-sufficiency and self-determination. These broad federal policies should be the backdrop for the pre-emption analysis and should, consequently, inform the judicial interpretation of statutes during a pre-emption analysis. [86]

Like the Court in *Bracker*, the *Ramah* Court balanced the federal interest against the state's interest.[87] It reasoned "in this case, the State does not seek to assess its tax *in return for the governmental functions it provides* to those who much bear the burden of paying this tax,"[88] once again indicating that the Court considered the validity of the state tax dependent on the value of the governmental services the state provides to support the taxed activity.

The Court concluded that the state had nothing more than a general desire to increase revenues, and such general interest did not justify the state tax.[89] It rejected the argument that off-reservation services[90] and general services provided by the state to the tribe[91] could justify the state tax.

Interestingly, the *Ramah* Court noted that the U.S. solicitor general had filed an amicus brief on behalf of the United States, suggesting that the Court modify its pre-emption analysis to hold that on-reservation activities involving a resident tribe

> are *presumptively* beyond reach of state law even in absence of comprehensive federal regulation, thus placing the burden on the State to demonstrate that its intrusion is either condoned by Congress or justified by a compelling need to protect legitimate, specified state interests other than the generalized desire to collect revenue.[92]

The Court declined to adopt a new approach because it felt the existing pre-emption analysis addressed the solicitor general's concerns.[93]

State Taxation of On-Reservation of Oil and Gas Are Pre-Empted by Federal Law or Should Be Limited by Federal Regulation

This section argues that due to the demands of the current oil and gas boom and to recent legislation, state taxation of non-Indian mineral development on reservation land (1) is pre-empted by federal law, or, alternatively (2) should be regulated by the Secretary of the Interior such that a state only collects tax revenue equivalent to the benefits it confers on the reservation for mineral development.

State Taxes of IMDA Leases Are Pre-Empted by Federal Law

Generally, the activity of Indian tribes and tribal members that occurs in Indian country is presumed to be immune from state taxation.[94] But, non-tribal members doing business in Indian country are not automatically immune from state taxation.[95] When the legal incidence of the tax falls on a non-Indian doing business with tribes in Indian country, courts apply a preemption and infringement test[96] whereby the courts analyze whether the state tax is pre-empted by relevant federal laws or whether the state tax interferes with the tribe's ability to exercise its sovereign functions.[97]

The pre-emption test is comprised of two basic analyses that are interrelated: (1) whether federal law expressly or impliedly pre-empts the state conduct at issue; and (2) a balancing test that weighs the state interest in the activity at issue against tribal and federal interests in the same activity.

First, courts determine whether federal legislation has pre-empted the state taxation at issue by examining the relevant federal legislation and applying a "flexible pre-emption analysis sensitive to the particular facts and legislation involved."[98] When "examining the pre-emptive force of the relevant federal legislation, [courts] are cognizant of both the broad policies that underlie the legislation and history of tribal independence in the field at issue."[99] Further, because tribal sovereignty is unique, the pre-emption analysis must

be informed by the general federal policy of promoting tribal self-sufficiency, tribal economic development,[100] and "'of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs.'"[101]

Second, this fact-specific inquiry "requires a reviewing court to undertake a 'particularized inquiry into the nature of the state, federal, and tribal interests at stake,' which is 'designed to determine whether, in the specific context, the exercise of state authority would violate federal law.'" That is, the courts balance the state interest in regulating the activity against the burden the state tax imposes on the tribe and against the federal interest in the activity.

Below, the two-part pre-emption test is examined in the context of the IMDA, FOGRMA, and ITEDSDA.

Congressional Intent and Federal Policy Underlying Legislation

Courts first turn to legislative language to determine whether there is an express or implied pre-emption of state taxes. Legislation can either expressly or impliedly pre-empt state taxation: "[F]ederal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity."[102] Ambiguities in federal law must be resolved in favor of tribal independence.[103] That is, if the federal legislation being analyzed for pre-emption purposes is silent regarding whether state taxes are pre-empted, such silence does not automatically indicate that the federal legislation does not prohibit state taxation, and state taxation can be impliedly prohibited.

Where the federal legislation at issue is silent, courts turn to the congressional intent behind the legislation to determine if state taxation would offend federal law.[104] In the context of oil and gas leasing, the Supreme Court has held that state taxation does not offend the congressional intent underlying IMLA, and therefore state taxes are not preempted by IMLA. In *Cotton*, the Court determined that IMLA contained no clear language that preempted state taxation, so the *Cotton* Court undertook an analysis of the congressional intent and history of IMLA.[105] Similarly, the IMDA, FOGRMA, and ITEDSDA, also contain no clear language prohibiting or allowing state taxation, thus, the congressional intent behind such statutes must be examined to determine whether state taxation offends the federal policy underlying the statutes.

The *Cotton* Court found determinative that the history and language of IMLA did not clearly reflect a congressional intent to maximize tribal profits for tribal minerals,[106] therefore state taxes did not offend the federal objectives underlying IMLA. The *Cotton* majority's interpretation of IMLA was of such import to the *Cotton* decision, that the *Cotton* dissent devoted a substantial analysis to refute this interpretation.[107]

In *Crow Tribe of Indians v. Montana*,[108] however, the U.S. Court of Appeals for the Ninth Circuit case summarily affirmed by the Supreme Court, a tribe leased on- and off-reservation coal to a non-Indian lessee pursuant to IMLA.[109] The *Crow* court reasoned:

> Congress attaches great significance to the firm federal policy of promoting tribal self-sufficiency and economic development. It intended that this policy be given broad preemptive effect. Moreover, no express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy.[110]

The *Crow* court continued that the purpose of the IMLA is to give a tribal government greater control over its property and to encourage tribal economic development.[111] Thus, the *Crow* court determined that the state tax at issue was pre-empted.

In the context of state regulation of Indian assets, the critical inquiry in determining whether state conduct violates the congressional intent underlying a particular statute seems to be whether the federal policy underlying the relevant statute is that *the full benefit of the Indian property inure to the tribe*. While *Crow* found that IMLA did reflect this intention for tribal minerals, *Cotton* found it did not.

Unlike the IMLA which, pursuant to *Cotton*, did not reflect a congressional intent to "maximize" tribal profits for Indian minerals, as discussed above, Congress clearly stated that one of two objectives of IMDA is to maximize the financial return to tribes for their valuable mineral resources.[112] Statutes such as FOGRMA and ITEDSDA supplement federal regulation of Indian mineral leases[113] with further safeguards for tribal interests. Both FOGRMA and ITEDSDA underscore Congress' concern that tribes derive *maximum* profit for their oil and gas. For example, FOGRMA regulations state that FOGRMA regulations are intended to ensure the Indian minerals are "developed in a manner that *maximizes*" the economic interest of the Indian mineral-owner.[114] ITEDSDA requires that any TERA agreements address the economic return to a tribe under a proposed lease or agreement.[115]

Thus, IMDA, FOGRMA, and ITEDSDA are more like the federal laws in *Bracker* that reflected a federal policy to guarantee that Indians would receive the *full* benefit of whatever profit the tribal forest was capable of yielding, because IMDA, FOGRMA, and ITEDSDA, clearly state and reflect a federal policy of maximizing the financial return to a tribe for its minerals. Accordingly, like in *Bracker*, where a state tax that reduced the tribe's timber revenue offended the federal policy of guaranteeing timber profits for tribes, the state tax of on-reservation oil and gas offends the federal policy underlying IMDA, FOGRMA, and ITEDSDA of maximizing the return to tribes for tribal minerals.

The federal policy underlying IMDA is to encourage more Indian involvement in the production of Indian minerals and more Indian ownership of the *revenues* of that production. Thus, like in *Ramah*, where federal policy was to vest more control of Indian education with tribes and a state tax on that activity offended such federal policy and was thereby pre-empted, here, the federal policy underlying IMDA is to vest more control of Indian minerals with tribes and a state tax on Indian minerals offends such federal policy and should be pre-empted.

Finally, like in *Bracker* and *Ramah*, where the broad federal policies of promoting tribal self-sufficiency and tribal economic development, of revitalizing tribal self-governance, and of assuming more control of tribal business and economic affairs informed the pre-emption analysis, those same broad federal policies should inform the pre-emption analysis for IMDA. Interestingly, the *Cotton* Court gave these broad policies little consideration in its analysis.[116]

As discussed above, IMDA, FOGRMA, and ITEDSDA differ substantially from IMLA in that the *clear policy* underlying these statutes is that tribes derive maximum financial return for tribal minerals and to vest tribes with greater control and interest in the production of their own minerals. Thus, state taxation of non-

Indian lessees producing on-reservation Indian oil and gas violates and obstructs realization of the federal policies underlying IMDA, FOGRMA, and ITEDSDA.

The Pre-Emption Balancing Test

The second part of the pre-emption analysis is to balance the state, tribal, and federal interests at issue.[117] Courts undertake this balancing test by (1) determining what the state's interests are in the regulated activity and weighing that interest against (2) the economic burden incurred by the tribe as a result of the state tax, and (3) against the federal and tribal regulatory scheme, and federal policy.[118] *Cotton*, *Ramah*, and *Bracker* define the contours of this balancing test; these cases and the factors relevant to the balancing test are discussed below.[119]

State Interest in Tribal Mineral Development Is Insufficient to Justify State Tax

"The State's interests in exercising its regulatory authority over the activity in question must be examined and given appropriate weight."[120] Whether a state has an interest in the regulated activity sufficient to justify state taxation of the activity is a fact-specific analysis conducted on a case-by-case basis. The "generalized revenue raising interest" of the state alone does not justify taxation.[121] Rather the state should have a specific legitimate regulatory interest in the activity taxed.[122]

To determine a state's interests in the regulated activity, courts look at whether a state has provided any services to the tribe or to the non-Indian being taxed[123] and also to whether the state has any regulatory authority over the activity taxed.[124] Nevertheless, how much weight a state's services or regulatory authority is afforded in the pre-emption balancing test is unclear.

First, it is unclear whether *general* state services provided to a tribe, on or off of its reservation, justify a state's interest such that it can tax the activity at issue. In *Bracker*, non-Indian industry use of state roads on the reservation was not a state interest sufficient to justify state taxation of the activity. The logging company compensated the state for the company's use of state highways within the reservation[125] and, other than the availability of state roads, the state provided no services to the on-reservation logging industry,[126] thus, the state had no interest in the logging activity it sought to tax.

In *Crow*, the state provided services to non-Indian coal mining companies on the reservation, such as limited reclamation of mining sites.[127] Coal mining revenue was "vital to the economic development of the Crow Tribe."[128] The state tax collected far exceeded the state monies spent on coal mining, and, thus, the state was profiting from its coal tax.[129] The state used the tax funds it collected for non-coal mining-related activity, such as permanent trust funds and general funds.[130] Because the state's tax was not narrowly tailored to reimburse the state for its expenditures related to coal mining, its interest in the tax balanced against the tribe's interest in coal production, was not significant enough to avoid preemption. Thus, in *Crow*, even where the state provided industry-specific, on-reservation services to the taxed industry, the state's interest did not outweigh the tribe's interest in the mineral revenue.

In the context of oil and gas development, however, the *Cotton* Court reasoned that the state had a sufficient interest in Indian mineral development because it provided services to the mineral producer and to the tribe, reasoning that "[the state] provides substantial services to both [the Tribe] and [the non-Indian mineral producer], costing the State approximately $3 million per year."[131] The Court never elaborates on what constituted the "substantial services" to the tribe, but accepted the district court's determination that

> [the state] spends approximately $3 million per year in providing on-reservation services to Cotton and the Tribe. In addition … [the state] does not discriminate against the Tribe or its members in providing state services; indeed, the State spends as much or more *per capita* on members of the Tribe than nonmembers…. [F]urther … [the state] provides services on the reservation not provided by either the Tribal or Federal Governments, and provides additional services off the reservation that benefit the reservation and members of the Tribe. Finally, … the state regulates the spacing and mechanical integrity of wells located both on and off the reservation.[132]

Thus, the *Cotton* Court considered the value of state services provided *off-reservation* to establish state interest *and* also included general benefits provided by the state to the tribe.[133] In *Ramah*, however, the Court squarely rejected the notion that off-reservation services and general services provided to the tribe could justify the state's tax; that is, pursuant to *Ramah*, the state must have a *specific, legitimate interest in the activity taxed* [134] to justify its tax.

The consequences of the *Cotton* Court's holding that general and off-reservation services can justify a state's tax of on-reservation services is that a state will *always* have an interest sufficient to justify its tax of on-reservation activity, so long as the state provides any services whatsoever to a tribe. This negates the fact-specific inquiry required by the pre-emption analysis. In *Ute Mountain Ute Tribe v. Rodriguez*, the court clearly reflected this consequence where it held that the off-reservation state roads and pipelines used to carry reservation oil and gas was the "more important" state service that 'primarily justifies the [state] tax at issue."[135] Thus, because of *Cotton* and *Rodriguez*, it is unclear whether the services provided off-reservation and general services provided to tribes can justify a state interest in the activity regulated.

Second, it is unclear whether federal and tribal regulation must be exclusive or whether minimal, ancillary state regulatory activity justifies a state interest such that state taxation is not pre-empted. In *Ramah*, the state did not have an interest in the construction of an on-reservation school for Indian children sufficient to justify state taxation of the construction. The federal government regulated, approved, and reviewed subcontracts for the school construction, conducted preliminary on-site inspections of the site and prepared cost estimates for the project, approved architectural and engineering agreements, could require certain contract terms, and ensured that the tribe was fulfilling its statutory obligations for schools.[136] The pervasive nature of the federal regulatory activity demonstrated that the state's interest in the construction of the Indian school was insufficient to justify a state interest in the activity.[137] In fact, the *Ramah* dissent indicates that the federal regulation of building construction was not exclusive.[138] Similarly, in *Crow*, the state had regulatory interest in the environmental consequences of on-reservation coal mining.[139] In both *Ramah* and *Crow*, the state's minimal regulation did not justify its taxation of

on-reservation activity.

Nevertheless, in *Cotton*, the Court held that because federal regulation of oil and gas was extensive, but "not exclusive," and the state had minimal regulatory authority, then the state had an interest in taxing oil and gas development. In *Cotton*, the state regulated "the spacing and mechanical integrity of the wells located on the reservation,[140] however, "the state law applied *not* of its own force, but only if its application [was] approved by the [BLM]."[141] That is, the federal government was the ultimate authority on well spacing and state did not have direct authority to regulate well spacing, but the federal government would adopt state standards for well spacing.[142] This "cooperative" regulatory relationship between the state and the federal government was "enough to support a conclusion that the federal regulations were not 'exclusive'… and therefore did not necessarily preempt state taxes."[143]

Similarly, in *Rodriguez*, the state provided several services to on-reservation oil and gas operations, such as "a hearing process for resolving disputes between operators, publicly available geologic records, publicly available production records, and records of sales and transfers, as well as plugging of abandoned wells and environmental cleanup and site inspection"; however, these services were rarely used.[144] The *Rodriguez* court found that these minimal services, combined with the state's supporting regulatory role for well "spacing, setbacks, and non-standard well location," and the off-reservation infrastructure (both roads and pipelines) used to transport oil and gas off of the reservation, justified a state interest in taxation.[145]

Third, it is unclear whether the *value* of the services provided by the state is relevant to determining whether a state has an interest in the activity. The *Cotton* Court found that even if the state provided *minimal* ancillary services to the regulated activity or to the non-Indian entity being taxed, the minimal state activity was sufficient to justify state taxation. In *Cotton*, the state provided minimal services to the non-Indian mineral producer and, thus, the state had a legitimate interest in the taxed activity: "Cotton conceded that from 1981 through 1985 New Mexico provided its operations with services costing $89,384"[146] which translated to approximately $17,876 per year in services for each of the five years. The producer responded that the taxes collected by the state far exceeded the value of the benefits conferred on it by the state, where the state collected $2.293 million in taxes on its production[147]—translating to approximately $458,790 per year in taxes. That is, the taxes collected by the state were vastly disproportionate to the state's expenditures on the reservation for mineral development, and profited the state by approximately $440,914 per year.

The *Cotton* Court, however, dismissed the mineral producer's proportionality argument because, it reasoned, there is no requirement that the benefits conferred by the state be equivalent to the taxes collected.[148] The Court reasoned that taxes are not an "assessment of benefits, but distributing the burden of the cost of government."[149]

Cotton's rejection of the proportionality argument seems directly contrary to the Court's earlier holding in *Crow*, *Ramah*, and *Bracker*, that indicated that the state's interest in taxing an activity was directly related to the state expenditures on the activity[150]; and, in fact, that a state tax should reimburse the state for state benefits provided for the on-reservation activity. Thus, *Cotton* seems to be an outlying case in this respect, as *Bracker*, *Ramah*, and *Crow* clearly indicate that courts have considered proportionality an important factor in assessing a state's interest in regulating on-reservation activity, and ultimately in determining whether a state tax of on-reservation activity is pre-empted.

Under IMDA and given the circumstanc-

es of the recent oil and gas boom, proportionality is relevant for several reasons. The *Cotton* Court correctly noted that taxes are intended to distribute the burden of the cost of government to the citizens benefitting from government services. In the Indian reservation context, there may be three sovereigns providing government services for on-reservation mineral development and the burden of the cost of government is shared among those sovereigns. Proportionality is a measurement of how the burden of the cost of government is distributed between multiple sovereigns. Here, the oil and gas boom is driving a substantial increase in the use of tribal infrastructure and services, resulting in degraded tribal infrastructure, drastically increased use of tribal regulators and government services, and stresses on a tribe's general finances. Where the majority of governmental services are provided by the tribe the cost of such services is borne largely by the tribe and, accordingly, the tribe should be permitted to collect the largest portion of the taxes to fund those services. Unlike the tribe in *Cotton*, the MHA Nation cannot increase its tribal tax to cover these costs for two main reasons: (1) it cannot raise its taxes because of the tax caps in the IMDA agreements; and (2) if it raises its taxes for non-IMDA agreements, it will lose business to non-Indian leases with a lower, single tax rate.

Under the *Cotton* analysis that ignores proportionality, a tribal government must shoulder the large majority of the increasing costs of mineral development while the state is allowed to collect the majority of the tribal mineral tax revenue and provide minimal services for mineral development on the reservation. That is, the tribe is being forced to bear the cost of government without the ability to recoup that cost through a tax, because its taxing ability is limited and reduced by state taxes.

Second, proportionality is relevant where the relevant federal legislation (in this instance, IMDA) is intended to *maximize* financial return to tribes for tribal minerals. As the *Bracker* Court reasoned, state taxes impede a federal policy intended to insure that tribes derive the maximum benefit from tribal resources.[151] If states may use tribal minerals as profit-making resources while laying the burden of funding government services at the tribe's feet, the tribe's ability to maximize its return from its minerals is severely hindered and the federal policy of garnering maximum return for tribal minerals is violated. State taxes impinge on tribal profits to the extent that the state taxes exceed the value of the services provided by the state to the on-reservation activity. This leads to the perverse result that a tribe will not profit from its minerals and the tribe will likely dip into money from its general coffers to fund mineral development infrastructure, while the state is profitting. That is, the cost of tribal mineral development will exceed the return therefrom to the tribe.

Third, the nature of the pre-emption balancing test which weighs state interests against the burden on tribes, implicates that proportionality should be considered because it is a tool to assess the burden on the tribe.[152] The *Cotton* dissent notes:

> Pre-emption analysis calls for a close consideration of conflicting interests and of their potential impact on one another. Under the majority's analysis, insignificant state expenditures, reflecting minimal state interests, are sufficient to support state interference with significant federal and tribal interests. The exclusion of all sense of proportion has led to a result that is antithetical to the concerns that animate our Indian pre-emption jurisprudence.[153]

Finally, the *Cotton* Court reasons that the state activity in *Cotton* was different from the state activity in *Ramah* and *Bracker*, which was insufficient to establish a state interest, because in *Ramah* and *Bracker*, there was complete "noninvolvement of the State in the on-reservation activity,"[154] and *Cotton* was "not a case in which the State has had nothing to do with the on-reservation activity, save tax it."[155] But this all-or-nothing approach is inconsistent with prior case law.[156] Further, it disregards the "fact-specific inquiry" weighing state interests against tribal and federal interest which is required by the pre-emption analysis. That is, the relevant test is to determine whether the application of a state's tax interferes with the tribe's sovereignty, imposes an economic burden on the tribe, or interferes or a comprehensive regulatory scheme governing the activity at issue; the test is not whether the state has provided minimal services that justify the state tax.

The Burden on the Tribe Pre-Empts the State Taxation of On-Reservation Oil and Gas

A tribe's interest in revenues derived from on-reservation activity arises from the semi-autonomous status of Indian tribes.[157] The preemptive power of a tribe's revenue-raising interest is "'strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.'"[158] The *Ramah* and *Bracker* Court held that state taxes were pre-empted where the tribe was economically burdened by the state tax. The *Cotton* dissent noted that this factor was largely ignored by the *Cotton* majority.[159]

Indirect effects of state taxes can economically burden tribes. In *Cotton*, the tribe did not reimburse the mineral developer for state taxes, but[160] in *Ramah* and *Bracker*, the non-Indian entity paid state taxes and the tribes reimbursed them for state tax payments; thus, the economic burden fell directly on the tribes.[161] In *Crow*, the court held that state taxes pose an economic burden to the tribe, even where the tribe itself does not pay the tax, because the state taxes increase the cost of production by the coal producers and because the state tax reduced the royalty paid to the tribe.[162] Further, the state tax negatively impacted the tribal coal's marketability because the tax forced coal producers to raise coal prices, which resulted in reduced demand for tribal coal.[163] In *Crow*, these indirect economic impacts to the tribe were substantial enough to pre-empt the state taxes.

The *Rodriguez* court noted that whether the tribe *indirectly* pays the tax weighs heavily into its assessment of the tribe's economic burden.[164] *Cotton*, too, seemed to differentiate the economic burden in *Cotton* from *Ramah* and *Bracker* because the tribe did not reimburse the mineral producer in *Cotton*.[165]

Both *Ramah* and *Bracker*, however, considered indirect economic impacts on the tribe. In *Ramah*, the Court reasoned that

> [t]his burden, although nominally falling on the non-Indian contractor, necessarily impedes the clearly expressed federal interest in promoting the 'quality and quantity' of education opportunities for Indians by depleting the funds available for the construction of Indian schools.[166]

In *Bracker*, the Court reasoned:

> [T]he imposition of state taxes would adversely affect the Tribe's ability to comply with [federal] management policies imposed by federal law. [The Tribe's expenditures on compliance with such management policies] are largely paid out of tribal revenues, which are in turn derived almost exclusively from the sale of timber. The imposition of state taxes on [the non-Indian contractors] would effectively diminish the amount of those revenues and thus leave the Tribe and its contractors with reduced sums with which to pay out federally required expenses.[167]

Indirect economic impacts on tribes are part of the pre-emption analysis. In *Cotton*, the tribe argued that the state tax economically burdened the tribe because it interfered with the tribe's ability to raise tribal taxes and it diminished the desirability of Indian leases vis-à-vis non-Indian leases.[168] The *Cotton* Court took account of these indirect economic impacts to the tribe but reasoned that the indirect economic burdens were "*too* indirect and *too* insubstantial to support [a] claim of pre-emption."[169] Because the Court found no evidence that the tribe could not raise tribal taxes and no evidence that the state tax deterred potential lessees from entering tribal mineral leases[170] the Court concluded that the state tax did not adversely affect the tribe's ability to attract oil and gas lessees,[171] and therefore there was no substantial economic burden on the tribe such that the state tax was pre-empted.

Similarly, the *Rodriguez* court noted that the tribes were not hindered from raising taxes because there was no cap on the taxes they could charge.[172] In fact, the court noted that: "if an existing lease or agreement prohibited an increase in taxes, or placed a cap on the percentage of revenues, that general authority to increase existing taxes or enact a third tax would be limited."[173]

For tribal oil and gas, the crucial inquiry is whether the state tax adversely affects on-reservation oil and gas development. The *Cotton* Court found that the burden imposed on the tribe by the state tax was not substantial because the tribe could increase its taxes without adversely affecting on-reservation oil and gas development.[174]

Nevertheless, current trends require a fresh look at the burden imposed on tribes by state taxation of tribal oil and gas. Pursuant to legislation, tribes increasingly bear more of the burden of providing government services for on-reservation activity. Further, as discussed above, post-1938 legislation regarding Indian oil and gas reflect a clear intent that tribes derive maximum profit from their oil and gas. Finally, the current oil and gas boom is burdening tribal infrastructure more so than in the recent past and forcing tribes to dip into their general coffers to meet the demands of on-reservation oil and gas development.

In the current context, a state tax imposes an economic burden on the tribe in two ways—it hinders a tribe's legislative right to derive maximum profit for its minerals and it increases the costs and negative impacts of mineral production to the tribe. First, where IMDA is intended to maximize the profit to the tribe for tribal minerals, the state tax cuts directly into that profit. It does so by reducing the after-tax profits that are available to tribes as participants with a working interest in mineral production companies *and* by denying the tribal government a substantial portion of the tax revenues that are collected. Even the *Cotton* Court admitted that the state tax in some way limits the profitability of Indian oil and gas leases.[175]

Second, the IMDA specifically contemplates that the Secretary will preserve the marketability of Indian minerals. Like in *Crow*, a state tax on Indian oil and gas decreases the marketability of tribal minerals because producers pay dual taxes, increasing the tax rate for Indian leases compared to non-Indian leases. The *Cotton* majority noted that state taxes impact the marketability of Indian minerals.[176] Thus, state taxes make Indian mineral leases less attractive and result in fewer Indian mineral leases.

Third, where tribes are working to compete against non-tribal mineral leases and must accommodate the demands of industry to cap taxes, tribes cannot raise their taxes because of either a contractual cap on taxes or because, if they raised taxes, mineral producers would look elsewhere for leases. Thus, unlike in *Cotton* and *Rodriguez*, where the tribes could raise their taxes without impeding on-reservation oil and gas development, now, because of the demands of oil and gas producers and the competition in the oil and gas industry, tribes cannot raise tribal taxes without breaching a lease contract or without the practical result of losing business.

Fourth, the state tax is squeezing the tribe's profit margin from both ends—both by decreasing its oil and gas revenue, as just discussed, and by *increasing the costs* associated with oil and gas development. The state's refusal to fund tribal infrastructure is increasing the cost of mineral production for the tribes. In the context of Indian oil and gas, costs of production include provision of governmental services, like tribal law enforcement, tribal regulators that ensure industry compliance with federal and tribal laws, the tribes' health clinic, and road maintenance. Here, Indian communities are impacted by the increased activity on the reservation resulting from oil and gas production. Further, oil and gas producers on Indian land benefit from the tribes' governmental services, such as road maintenance and police protection, but fail to fully contribute for such services through taxes because a portion of those taxes are diverted to the state and away from the tribe. Thus, where a state taxes Indian oil and gas, but provides few or no governmental services for mineral production, the tribe funds the entirety of the governmental services while being limited in the revenues it can collect to cover the cost of such services. The ability of the tribe to maximize its mineral profit is not only impacted by the depleted tax revenues, but is also impacted by the increased costs associated with burgeoning energy development.

Finally, the inability of tribes to collect more taxes or profit from mineral production coupled with the increased use of tribal infrastructure creates exponential degradation of tribal infrastructure, like roads. This degradation not only hinders the growth of the oil and gas industry, but endangers Indians and non-Indians alike using these roads.

As tribes have to dip into general tribal coffers to fund infrastructure for the oil and gas industry because they cannot collect adequate taxes from the industry, other general tribal governmental services become underfunded as general tribal coffers are depleted. Thus, state taxes also negatively impact a tribe's overall self-governance in several ways. First, the state taxes impact the tribe's ability fund its essential services because, by taking a portion of the taxes collected, they decrease tax revenue that the tribe could collect for its general governmental services.[177] Further, funds devoted to providing essential governmental services to tribal members are diverted to funding services for the oil and gas industry. This would not be the case if the tribe was fully compensated for its governmen-

tal services by the oil and gas producers through an all-tribal tax.

Federal Regulation of Oil and Gas Is Comprehensive and Leaves No Room for State Taxation

Finally, to determine the federal interest in the activity at issue, courts look to the extent of federal regulation of such activity. Federal regulation and control of a specific activity can be so comprehensive that it preempts state taxes.[178] Post-1938 federal regulation of Indian oil land is comprehensive and pervasive,[179] regulating everything from environmental consequences and requirements of mineral development. It is unclear, however, how pervasive federal regulation must be in order to pre-empt state taxation.

As discussed above, under *Cotton* and *Rodriguez*, even the most ancillary, indirect state regulation can cause federal regulation to be "non-exclusive" and therefore not sufficient to pre-empt state taxation. The *Cotton* Court determined that because the state provided services regarding spacing requirements and mechanical integrity of wells, the federal regulatory scheme overseeing Indian oil and gas was not exclusive, and therefore did not pre-empt state regulation.[180] However, this notion that minimal state services could hamper the comprehensive nature of federal regulation was implicitly rejected in *Bracker*, where state roads were used by the on-reservation industry, and was expressly rejected in *Ramah* and *Crow* where the state had some regulatory function over the activity at issue.

The black-and-white "exclusive or non-exclusive" test adopted by *Cotton* contradicts the basic premise that a preemption analysis is "not dependent on mechanical or absolute conceptions of state or tribal sovereignty."[181] And, as the *Cotton* dissent notes, the state regulation of spacing and mechanical requirements is implemented only with the approval of federal entities.[182] Thus, the state regulation of well spacing actually falls under the auspices of the federal government's ultimate and overarching authority for Indian oil and gas.

The consequences of the *Cotton* holding that *minimal* state involvement with the on-reservation activity is sufficient to avoid preemption, even where the federal government has comprehensive and pervasive authority over the activity, results in the irrational outcome that where a state standard has been adopted by a federal regulator, and the state actually has no regulatory authority on a reservation, that adoption can vest a state with a regulatory interest sufficient to avoid preemption.

The notion that even the most minimal state involvement in regulating a specific activity prevents pre-emption directly contradicts the traditional pre-emption doctrine applied in the state-federal context, which, while not directly applied in the state-Indian context, is a useful guide. Under traditional state-federal pre-emption doctrine, minimal state regulation cannot avoid preemption if the federal government substantially occupies regulation of a certain activity: "[W]hen the Federal Government completely occupies a given field or an *identifiable portion* of it, … the test of preemption is whether 'the matter on which the State asserts the right to act is in *any way* regulated by the Federal Act.'"[183]

Neither *Ramah* nor *Crow* required the federal regulation of the on-reservation activity to be exclusive, but only comprehensive and pervasive. Like the federal regulation in *Bracker* that vested the federal government with substantial regulatory authority in almost every aspect of Indian timber marketing and production, the IMDA, FOGRMA, ITESDSA, and the Onshore Oil and Gas Regulations, vest federal and tribal government with broad regulatory authority to oversee tribal oil and gas development, establishing a more comprehensive role for federal and tribal regulation and reflecting an intent to occupy the field of regulating tribal oil and gas. Federal statutes regulate every aspect of tribal oil and gas development, from what factors to consider when negotiating oil and gas contracts,[184] to how royalties are collected and managed,[185] to how oil and gas well-sites are drilled and produced,[186] and the environmental and collateral consequences of mineral production.[187] Thus, like the comprehensive management authority of the federal government in *Bracker, Ramah,* and *Crow,* which pre-empted state taxation, under IMDA, FOGRMA, ITESDSA, and the Onshore Oil and Gas Regulation, the federal government has broad and comprehensive management authority over Indian oil and gas, pre-empting state taxation thereof.

The Secretary Should Regulate State Taxation of On-Reservation Oil and Gas

Setting aside the assertion that the above-mentioned statutes pre-empt state taxation of on-reservation oil and gas, the Secretary can and should regulate and limit state taxation of on-reservation oil and gas such that a state can only collect taxes that reimburse the state for its costs related to on-reservation mineral development. The Secretary's duty to regulate state taxation of Indian minerals derives from the Secretary's statutory responsibility to ensure that states do not prevent tribes from deriving maximum profit from tribal minerals and to protect tribal assets, like roads, from uncompensated overuse.

Secretarial Authority and Duty to Regulate State Taxation of Indian Oil and Gas

This section argues that the Secretary has statutory authority to regulate and limit state taxation of Indian oil and gas. It is well established that "Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property."[188] Congress can delegate its authority over Indian matters to the Secretary of the Interior.[189] When the Secretary promulgates agency regulations pursuant to a valid delegation of authority from Congress, such regulations have the power of federal law and can pre-empt state law.[190]

Some courts find that § 2 and § 9 or Title 25 of the U.S. Code, by themselves, vest the Secretary with the authority to regulate and enforce tribal rights secured by treaty or statute.[191] Other courts find that § 2 and § 9 do not by themselves grant the Secretary authority to regulate Indian affairs, but that these sections must be combined with another statute or treaty that authorizes the Secretary to regulate the activity at issue.[192] Under either analysis, the Secretary has the authority to regulate state taxation of Indian oil and gas. Here, the two sources of the Secretary's regulatory authority are (1) the numerous statutes and regulations which were discussed above and which set forth the government's comprehensive management duties vis-à-vis Indian oil and gas,[193] and (2) the government's duties as trustee of Indian oil and gas.

The Secretary Has a Statutory Duty to Regulate State Taxation of On-Reservation Oil and Gas

Where a statute expressly or implicitly sets forth secretarial management duties for Indian property, such statute can be the basis for the Secretary's authority to limit state regulation of

the property.[194] Here, the Secretary has comprehensive, statutorily based management duties with regard to the development of Indian[195] minerals,[196] arising from the statutes discussed herein. These statutes, in combination with § 2 and § 9, give the Secretary broad authority to regulate Indian oil and gas development in a manner that maximizes the return to tribes for their minerals and in a manner that prevents degradation of tribal infrastructure resulting from mineral development.

Specifically, as discussed above, the Secretary has a statutory obligation to facilitate maximum returns for Indian oil and gas arising from the IMDA and from FOGRMA regulations because the stated congressional intent behind the IMDA and FOGRMA clearly reflect a congressional will to maximize tribal profits for tribal minerals. The Secretary's authority to regulate is "the power to adopt regulations *to carry into effect the will of Congress*."[197]

To satisfy that congressional intent underlying IMDA, the Secretary must ensure that a proposed mineral lease is "in the best interests of the tribe."[198] Pursuant to IMDA regulations, the Secretary can take an administrative action,[199] such as issuing regulations, to protect the marketability of Indian oil and gas and to protect the tribes' ability to maximize its mineral revenue. When evaluating whether to take an administrative action, the "best interest" standard requires that the Secretary consider the *economic return* to the tribe[200] and the *marketability* of the mineral product.[201]

As discussed above, the state's taxation of the tribe's minerals adversely impacts the economic return to the tribe for its minerals in numerous ways and decreases the marketability of Indian minerals. Because the state taxes adversely impact both the economic return to the tribes and the marketability of the tribes' minerals, the Secretary should regulate the state's conduct to mitigate these adverse impacts on tribes.

As a Trustee, the Secretary Should Regulate State Taxation of Indian Oil and Gas

The Secretary of the Interior is a trustee for many tribal assets, and, similar to a private trustee, as trustee the Secretary has fiduciary responsibilities for tribal oil and gas. These trustee duties, in combination with § 2 and § 9 of, grant the Secretary the authority to regulate state taxation of tribal minerals. The government's trust responsibility for Indian resources along with a tribe's request that the government regulate its assets, in combination with these sections, are a basis for the Secretary's authority to regulate such assets.[202]

It is well established that the federal government is a trustee for Indian oil and gas. FOGRMA[203] expressly states that the United States has broad trust responsibilities for the administration of Indian oil and gas. ITESDA[204] expressly reaffirms the Secretary's trustee duties for Indian minerals and other Indian trust assets impacted by tribal energy development. Similarly, the judiciary has recognized that the United States is a trustee for Indian oil and gas. Because the federal government is a trustee of Indian oil and gas, the Secretary has fiduciary duties for such oil and gas.[205] The Secretary also has trustee responsibility for allotted oil and gas resources.[206] Thus, the Secretary has authority to regulate state taxation of Indian oil and gas because, in combination with § 2 and § 9, he is a trustee of Indian oil and gas, he has comprehensive duties in the statutes discussed above, and tribes are requesting that the Secretary act on their behalf.

What the Secretary's specific trustee duties include is a fact-specific analysis.[207] In the context of Indian oil and gas development, Secretary's trustee duties likely include a duty to facilitate the maximum return to tribes for tribal oil and gas.

Once a statute and federal regulations establish the federal government's trustee relationship vis-à-vis Indian assets, common-law trust principles that apply to private trustees can inform the contours of the federal government's trustee duties.[208] Even in the recent *United States v. Jicarilla Apache Nation*,[209] which is a decision limiting the scope of the U.S. fiduciary obligation to tribes,[210] the Court acknowledged:

> [P]articular statutes and regulations … clearly establish fiduciary obligations of the Government in some areas …. Once federal law imposes such duties, the common law could play a role. We have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed. But the applicable statutes and regulations establish the fiduciary relationship and define the contours of the United States' fiduciary responsibilities.[211]

Common-law trust duties include the duty to make trust property productive[212] and to preserve trust property.[213] Consequently, the Secretary's trustee duties for Indian oil and gas likely include a duty to help

tribes ensure that tribal minerals remain productive.

Here, the statutes discussed above establish specific trustee duties for Indian oil and gas. For example, as trustee, the Secretary must consider economic factors and the marketability of Indian oil and gas in his assessment of whether a lease is in the "best interest of a tribe."[214] Another fiduciary duty includes not impairing the value of Indian oil and gas.[215] Thus, as trustee, the Secretary must protect and preserve the marketability and economic return for tribal minerals.

Whether the Secretary's trustee duties for Indian oil and gas include a duty to *maximize* revenue for Indian oil and gas is unclear. Courts once held that the Secretary's fiduciary duties include the duty to maximize trust income for the tribe's oil and gas.[216] In *Cheyenne-Arapaho Tribes of Oklahoma v. United States*,[217] the U.S. Court of Appeals for the Tenth Circuit reasoned:

> Since the Secretary's discretion is limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands and as the supervisor and administrator of oil and gas leases on those lands, the following holds true: Acting in the capacity as a trustee, the Secretary and his delegate, the Superintendent of the BIA, must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and *has a duty to maximize lease revenues*.[218]

Nevertheless, this basic premise has been cast into doubt by recent case law.[219] In *United States v. Navajo Nation*[220] and in *Cotton*, the Court expressly held that *the IMLA* did not create a duty to maximize profits for Indian oil and gas:

> To the extent Cotton seeks to give the Secretary's reference to "the greatest return from their property" "talismanic effect," arguing that these words demonstrate that Congress intended to guarantee Indian tribes the maximum profit available without regard to competing state interests, it overstates its case.[221]

It is important to note both *Navajo Nation*,[222] and *Cotton*,[223] analyzed the Secretary's trustee duties pursuant to the IMLA, and are not applicable to IMDA agreements because as discussed above, the *expressly stated* purpose of the IMDA is to maximize the financial return to tribes for their mineral resources and FOGRMA regulations expressly state that they are intended to maximize financial return for Indian minerals. Thus, the *Navajo Nation*, *Cotton*, and *Shoshone* analysis are inapplicable to IMDA leases, and FOGRMA which supplements existing statutes governing tribal oil and gas leases. Therefore, the Secretary has a fiduciary obligation under IMDA and FOGRMA to help tribes maximize their profits for tribal oil and gas arising from IMDA and FOGRMA.

Additionally, as trustee for Indian minerals, the Secretary should ensure that the tribes are allowed to develop tribal assets in a sustainable manner and should protect tribal land and infrastructure from the impacts of mineral development. Generally, the Secretary's trustee duties over Indian assets include protection, preservation, and maintenance of Indian assets to ensure sustainable future use.[224] Specifically, as trustee for Indian trust land[225] where oil and gas development occurs, the Secretary has managerial duties that include, for example, protecting the land from environmental degradation and ensuring oil and gas resources are diligently and sustainably developed.[226]

Where a state action adversely impacts tribal trust land, the United States can act to limit the state action because its obligations as trustee give the United States a direct interest in the protection of trust lands.[227] That is, the federal government can act in its capacity as a trustee for tribal property to protect such property from state interference. This is clearly reflected in numerous cases.[228,229] Here, where tribal roads are being degraded because tribes have inadequate funds to maintain their infrastructure in light of the increasing use of their infrastructure caused by the oil and gas boom, *and* the funding stream for the infrastructure is being depleted by state taxation of oil and gas revenues while the state does little to mitigate the damage to the roads, the Secretary's trustee duties include protecting and preserving the Indian land by limiting the state's share of taxes so that the taxes go to the tribes to preserve and maintain their roads.

In sum, the Secretary is statutorily authorized to ensure a tribe realizes maximum profits from its minerals and is statutorily authorized to regulate state conduct. The Secretary is statutorily authorized to mitigate the impact of mineral development on tribal land and resources. Because the state's taxation of tribal oil and gas interferes with tribes' statutory right to maximum revenues for their oil and gas, and inhibits the tribes' ability to mitigate the impact of mineral development by depleting the funds available for such mitigation, the Secretary can limit the state's taxation of the tribe's mineral development.

The Secretary Should Regulate State Action to Protect Tribal Rights Arising From Statute

The Secretary can regulate to implement the will of Congress as expressed in legislation.[230] When interpreting legislation, the courts look to the plain language of statutes and to legislative history to discern the "will of Congress."[231] Here, as discussed above, the legislative history of IMDA and the language of IMDA and FOGRMA reflect congressional intent to maximize tribal profits for tribal minerals and the Secretary may regulate to implement those congressional intentions.

As discussed above, where a generally applicable state law or policy is imposed on tribal trust assets, the Secretary may regulate to limit application of the state law to tribal property in order to protect the trust asset.[232] Pursuant to 28 U.S.C. § 1360, a state's regulatory authority over Indian trust property is subject to federal regulations and federal limitations imposed on specific state laws.[233] While § 1360 has been held not to *automatically* immunize non-Indian lessees of Indian property from state taxes,[234] the Secretary retains his § 1360 authority to exercise the ability to regulate state taxes on non-Indian lessees. Where a generally applicable state law or policy interferes with a tribe's statutory or treaty right, and the Secretary is authorized to protect such rights, he can promulgate regulations that immunize a tribe from the offending state law.[235] In *Metlakatla Indian Community v. Egan*, a tribe had treaty fishing rights and the state of Alaska passed a ban on the use of salmon fishing traps.[236] The Secretary had authority to regulate the tribe's fishing rights and issued regulations that immunized the tribe from the state ban on fishing traps.[237] While the Court held that the Secretary was not authorized to issue the regulations pursuant to two statutes,

he was authorized to do so by the treaty.[238]

Similarly, here, the Secretary is statutorily authorized to ensure a tribe realizes maximum profits from its minerals, statutorily authorized to protect trust assets, like land, from the adverse impacts of mineral development, and statutorily authorized to regulate state conduct. State taxation of tribal oil and gas interferes with a tribe's statutory right to maximum revenues for their oil and gas, and impedes the tribe's ability to fund adequate infrastructure resulting in degraded Indian lands. Thus, the Secretary may regulate to prevent such state interference.

Conclusion

States can be the "deadliest enemies" of Indian tribes,[239] because of the relentless pursuit by states to erode Indian sovereignty, subjugate Indians to state interests, and intrude on and interfere with Indian self-governance. As a reaction, Indian jurisprudence has evolved in large part to address the historically conflicting nature of tribal-state relations.[240]

The state taxation of Indian oil and gas discussed in this article is just one vivid and stark example of state incursion onto Indian sovereign interests and of state appropriation of valuable Indian resources. The minerals underlying a tribe's reservation, like timber, constitute *the tribe's* natural resources and are strictly tribal property.[241] The *Crow* court noted "the Tribe's coal *is not the state's to regulate* … it has no such legitimate interest in appropriating Indian mineral wealth."[242] It is for these reasons that state taxation of non-Indian producers of oil and gas from Indian lands must be stopped and/or curtailed so that Indian nations and their citizens can receive the full economic interest from the development of *their* land and minerals. Only then will Congress' true intent be carried out as set forth in the various statutes cited herein.

Like jurisprudence, federal policy has also evolved to vest tribes with more independence, self-governance, control of their natural resources and their economic destinies. The statutes discussed herein move forward that policy by giving tribes more control of their mineral resources as a tool for economic development and prosperity. Without the ability to raise tax revenues, tribes are unable to provide the physical and governing infrastructure necessary to promote economic development and are thereby hindered from attaining real tribal self-determination. Therefore, state taxation offends the broad federal policies of promoting tribal self-determination and tribal self-sufficiency and these broad federal policies pre-empt state interest in taxing Indian minerals.

Aside from federal statutes and policy that pre-empt state taxation of on-reservation Indian oil and gas development, the Secretary has a statutory authority and duty to regulate and limit state taxation of Indian oil and gas to further the federal policy of empowering tribes to control their own resources and of ensuring that the benefit of valuable Indian resources inure to the tribes. The Secretary's authority and obligation are augmented by his duty as trustee for tribal minerals. Accordingly, the Secretary should regulate state taxation of Indian oil and gas to stop the continuous and unending state incursion on Indian sovereignty and the unending state effort to appropriate and profit from Indian mineral wealth at the expense of the Indians.

Given the developments in federal policy regarding tribal control of Indian energy resources and Indian self-governance, the potential to move tribal nations substantially toward energy and economic independence presented by the current oil and gas boom, and the conflict between the outlier case, *Cotton*, and *Crow*, *Bracker*, and *Ramah*, the federal government should take note that times have changed since *Cotton* and there is clear justification to pre-empt state taxation of on-reservation, non-Indian oil and gas production and compelling reasons for the Secretary to limit or curtail such taxation.

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Endnotes

[1]*See Tribal Energy Self-Sufficiency Act and Native American Energy and Self-Determination Act: Hearings on S. 424 and S. 522 Before the Senate Comm. on Indian Affairs*, 108th Cong. 93 (2003) (statement of Theresa Rosier, Counselor to the Assistant Secretary-Indian Affairs, U.S. Dep't of the Interior).

[2]*See id.* (Statement of Sen. Ben Nighthorse Campbell, chairman, S. Comm. on Indian Affairs).

[3]U.S. Dep't of the Interior (DOI), *Oil and Gas Utilization, Onshore, and Offshore: Updated Report to the President* fig. 2, at 15 (May 2012) [hereinafter DOI Report].

[4]*See* DOI Report, *supra* note 3.

[5]*See id.*; Raymond Cross, *Development's Victim or Its Beneficiary: The Impact of Oil and Gas Development on the Fort Berthold Indian Reservation*, 87 N.D. L. Rev. 535, 537 (2011) (discussing driving factors for recent oil and gas boom in North Dakota).

[6]*See* Lauren Donovan, *Oil Boom Hits Fort Berthold Reservation Hard*, Bismark Trib, Apr. 4, 2012, bismarcktribune.com/bakken/oil-boom-hits-fort-berthold-reservation-hard/article_174f2d62-7e0d-11e1-957b-001a4bcf887a.html.

[7]Oil and Gas Tax Agreement Between the Three Affiliated Tribes and the State of North Dakota (Jan. 13, 2012), *available at* www.nd.gov/tax/oilgas/threeatribes/pubs/oilgastaxagreement.pdf.

[8]Indian reservations are comprised of different types of land, including: Indian trust lands, which are lands held in trust by the United States for the benefit of the tribe; tribally owned fee land, which is land owned by a tribe but not held in trust by the federal government; allotted lands, which are lands owned by individual Indians and which cannot be alienated without the approval of the federal government; and non-Indian owned lands.

[9]25 U.S.C. §§ 2101-2108 (1982).

[10]*See* Cross, *supra* note 6, at 536-44.

[11]*See id.*

[12]52 Stat. 347, 25 U.S.C. §§ 396a-396g (1938).

[13]The IMLA preserved the right of Indian Reorganization Act

tribes to lease lands for mining in accordance with their charters or constitutions. 25 U.S.C. § 396b (1938). Felix S. Cohen, Cohen's Handbook of Federal Indian Law 1125, § 17.03(2)(a) (Nell Jessup Newton ed., 2012) [hereinafter Cohen's Handbook].

[14]25 U.S.C. § 396a.

[15]25 C.F.R. pt. 212.

[16]*E.g., id*. § 211.20(b); *id*. § 211.54.

[17]*Id*. § 211.54. Cohen's Handbook, *supra* note 14, at 1127, § 17.03(2)(a).

[18]Cohen's Handbook, *supra* note 14, at 1127-28, § 17.03(2)(a) (citing Op. Sol. Interior, M-36896, No. 7, 1977, Tax Status of the Production of Oil and Gas Leases From Leases of the Fort Peck Tribal Land Under the 1938 Mineral Leasing Act).

[19]Cohen's Handbook, *supra* note 14, at 1128, § 17.03(2)(a) (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985)).

[20]*Id*. at 701, §8.03[1][c].

[21]*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 179 (1989); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 56 Fed. Cl. 639, 643-44 (Fed. Cl. 2003) (discussing *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988), and *United States v. Navajo Nation*, 537 U.S. 488, n.16 (2003)).

[22]25 U.S.C. §§ 2101-2108 (implemented by regulations at 25 C.F.R. pt. 225) (1982).

[23]H.R. Rep. No. 746, 97th Cong. 1982:

> The most serious problem with [the IMLA], however, is that it authorizes development of tribal oil and gas resources only by leasing. This requirement ignores the possibility of joint ventures, joint production agreements, risk service contracts and other non-lease ventures which are commonly used in mineral development today. *Such non-lease ventures can provide the vehicle by which tribes can become directly involved in management decisions*. The normal lease arrangement merely turns over responsibility for all development decisions to the lessee. (Emphasis added.)

[24]S. Rep. No. 97-472, 97th Cong. (1982) (emphasis added). *See Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1458 (9th Cir. 1986) (same).

[25]25 C.F.R. § 225.1(a).

[26]*Id*. § 2102(a).

[27]*Id*. § 225.3.

[28]*Id*. § 2105.

[29]Cohen's Handbook, *supra* note 14, at 1130, § 17.03(2)(b) (citing 25 U.S.C. § 2102(a)-(b); *id*. § 225.20(a)-(b) (emphasis added)).

[30]25 U.S.C. § 2104(a); Cohen's Handbook, *supra* note 14, at 1129, § 17.03(2)(b).

[31]25 C.F.R. § 225.22(c)(2).

[32]*Id*. § 2107.

[33]Cohen's Handbook, *supra* note 14, at 1130, § 17.03(2)(b) (citing 25 C.F.R. § 225.3 (emphasis added)).

[34]30 U.S.C. § 1701-1757 (1982).

[35]Cohen's Handbook, *supra* note 14, at 1132, § 17.03(2)(c) (citing 30 U.S.C. § 1701(b)(4) and *Pawnee v. United States*, 830 F.2d 187, 189-90 (Fed. Cir. 1987) ("FOGRMA creates enforceable trust obligations")).

[36]25 C.F.R. § 212.4 (emphasis added).

[37]Indian Energy Resources Act of 1992, Pub. L. No. 102-486, tit. 26, 106 Stat. 3113 (Oct. 24, 1992).

[38]Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. §§ 3501-3506; 25 C.F.R. pt. 224.

[39]25 C.F.R. § 224.30 (defining energy resources covered by ITEDSDA regulations to include oil and gas).

[40]*Id*. § 3504(a) (1982).

[41]*Id*. § 3504(d)-(e).

[42]*Id*. § 224.30.

[43]*Id*. § 3504(e)(2)(B)(iii)(IV) (emphasis added).

[44]*Id*. § 3504(e)(2)(B)(iii)(XVI)(bb); *id*. § 3504(e)(2)(D)(ii).

[45]*Id*. §§ 211.1, 225.1, 225.4.

[46]43 C.F.R. § 3160 (1982).

[47]*Id*. § 3162.5-1.

[48]*Id*. § 3162.1.

[49]490 U.S. 163, 178 (1988).

[50]*Id.* at 179-80.

[51]For the tax years 1981–1985, the state collected $47.483 million from on-reservation, non-member oil and gas producers and only provided $10.704 million in services to the reservation as a whole. *Cotton*, 490 U.S. at 170, n.6. But, the *Cotton* court reasoned that the state provided $3 million in services to the tribe and to the mineral producer. *Id.* at 185.

[52]*Id.* at 185-87.

[53]*Id.* at 186.

[54]*Id.* at 186.

[55]*Id.* at 187-88.

[56]*Id*. at 189.

[57]448 U.S. 136 (1980).

[58]*Id.* at 137-38.

[59]*Id.* at 139.

[60]*Id.* at 140, n.6.

[61]*Id.* at 138, 143-45.

[62]*Id.* at 148, n.15.

[63]*See id.* at 143-44.

[64]*Id.* at 145.

[65]*Ramah Navajo Sch. Bd. v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 838-39 (1982) (summarizing *Bracker*).

[66]*Bracker*, 448 U.S. at 146.

[67]*Id.* at 147.

[68]*Id.* at 148.

[69]*Id.* at 148-49.

[70]*Id.* at 150 (emphasis added).

[71]*Id*. at 151. In *Bracker*, the tribe agreed to reimburse the logging company for taxes incurred for its on-reservation activity. *Id*. at 140. The Court, however, does not state this is the reason the economic burden falls on the tribe and it discusses how the "imposition of the state taxes would adversely affect" the tribe because it would reduce its timber revenues. *Id.* at 149-50.

[72]*Id.*

[73]*Id*. at 149 (quoting 25 C.F.R. § 141.3 (a)(3)).

[74]*Id*.

[75]*Ramah Navajo Sch. Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982).

[76]*Id*. at 834.

[77]*Id.* at 834-35.

[78]*Id.* at 835.

[79]*Id.*

[80]*Id*. at 838.

[81]*Id.* at 839.

[82]*Id.*

[83]*Id.* at 841.

[84]*See id*. at 846-47 ("[T]he comprehensive federal regulatory scheme and the express federal policy of encouraging tribal self-sufficiency in the area of education preclude the imposition of the state gross receipts tax in this case.").

[85]*Ramah,* 458 U.S. at 840 (citing 24 U.S.C. § 450a(c)).

[86]The traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs [the inquiry into federal and tribal interests]. Relevant federal statutes … must be examined in light of the "broad policies that underlie them and the notions of sovereignty that have develop from historical traditions of tribal independence."

[87]*Id.* at 839, 843.

[88]*Id.* at 843 (emphasis added).

[89]*Id*. at 845.

[90]*Id.* at 844.

[91]*Id.* at 845, n.10.

[92]*Id*. (emphasis added).

[93]*Id*. at 846.

[94]Cohen's Handbook, *supra* note 14, at 696-98, § 8.03[1][b].

[95]*Id.* at 698, § 8.03; *id*. at 706, § 8.03[1][d].

[96]*Id*. at 698, § 8.03[1][b].

[97]*Ute Mountain Tribe v. Rodriguez*, 660 F.3d 1177, 1185 (10th Cir. 2011) (citing *Bracker*, 448 U.S. at 142 and *Ramah*, 458 U.S. at 837).

[98]*Cotton,* 490 U.S. at 176.

[99]*Id.*

[100]*Bracker*, 448 U.S. at 143-44.

[101]*Id.* at 149 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973)). *See also Ramah*, 458 U.S. at 838 ("Relevant federal statutes … must be examined in light of the broad policies that underlie them *and* the notions of sovereignty that have developed from historical traditions of tribal independence.") (Internal citations omitted and emphasis added.)

[102]*Ramah*, 458 U.S. at 838 (citing *Bracker*, 448 U.S. at 143-44).

[103]*Id.*

[104]*See*, *e.g.*, *Cotton*, 490 U.S. at 175, 180; *Ramah*, 458 U.S. at 839-40; *Bracker*, 448 U.S. at 143-46.

[105]*Cotton,* 490 U.S. at 177.

[106]*Id.* at 177-83. In *Cotton*, the mineral developer argued that the legislative history of IMLA demonstrates that IMLA "embodies a broad congressional policy of maximizing revenues for Indian tribes." *Id.* at 178. The developer's argument was based on a sentence in a letter from the Secretary of Interior explaining that IMLA was intended to bring uniformity to laws relating to the lease of tribal lands for mining purposes *and* that present law did not give the Indians the greatest return from their property. *Id.* (citing S. Rep. No. 985, 75th Cong. (1937); H.R. Rep. No. 1872, 75th Cong. (1938)). The *Cotton* Court rejected the developer's argument, stating:

> To the extent Cotton seeks to give the Secretary's reference to "the greatest return from their property" talismanic effect, arguing these words demonstrate Congress intended to guarantee Indian tribes the *maximum* profit available without regard to competing state interests, it overstates its case.

Id. at 179 (emphasis added).

[107]*Cotton,* 490 U.S. at 194-203.

[108]819 F.2d 895 (9th Cir. 1987), *summarily aff'd*, 484 U.S. 997 (1988).

[109]*Id.* at 896-97.

[110]*Id*. at 898.

[111]*Id*.

[112]S. Rep. No. 97-472, 97th Cong. (1982).

[113]*See Cotton*, 490 U.S. at 205 (J. Blackmun, dissenting).

[114]25 C.F.R. § 212.4.

[115]*Id*. § 3504.

[116]The *Cotton* majority summarily dismissed that broad federal policies cannot be interpreted to pre-empt state taxation of Indian oil and gas in a footnote, giving short rift to the importance of the broad federal policies regarding Indian sovereignty that have informed the preemption jurisprudence. *See Cotton*, 490 U.S. at 183, n.14. The *Cotton* dissent gives context to the IMDA using the same federal legislation and policy rejected by the majority. *See id.* at 203.

[117]*Cotton*, 490 U.S. at 184; *Ramah*, 458 U.S. at 838; *Bracker*, 448 U.S. at 145; Cohen's Handbook, *supra* note 14, at 707, § 8.03[1][d].

[118]*See id.* at 184-85.

[119]*See* Cohen's Handbook, *supra* note 14, at 707, § 8.03[1][d] (listing salient factors).

[120]*Ramah*, 458 U.S. 838.

[121]*See id.* (citing *Bracker*, 448 U.S. at 150).

[122]Cohen's Handbook, *supra* note 14, at 707, § 8.03[1][d] (citing *Ramah*, 458 U.S. at 844 and *Cotton*, 490 U.S. at 186).

[123]*See*, *e.g.*, *Cotton*, 490 U.S. at 186-87; *Ramah*, 458 U.S. at 843-44; *Bracker*, 448 U.S. at 148-49.

[124]*See*, *e.g.*, *id*.

[125]*Bracker*, 448 U.S. at 140, n.6.

[126]*Id.* at 150.

[127]*Crow*, 819 F.2d at 900.

[128]*Id*. at 901.

[129]*Id*. at 902.

[130]*Id*. at 901.

[131]*Cotton,* 490 U.S. at 185 (internal citations omitted).

[132]*Id.* at 171, n.7.

[133]*Id.* at 189.

[134]*Ramah*, 458 U.S. at 844, n.10 (emphasis added). Cohen's Handbook, *supra* note 14, at 707, § 8.03[1][d] (citing *Ramah*, 458 U.S. at 844 and *Cotton Petroleum Corp.*, 490 U.S. at 186).

[135]660 F.3d 1177, 1199 (10th Cir. 2011).

[136]*Ramah*, 458 U.S. at 841.

[137]*Id*. at 841-42.

[138]*Id.* at 841, n.5, 851 ("[T] he [federal] regulations on which the Court relies do not regulate school construction, which is the activity taxed.").

[139]*Crow*, 819 F.2d at 901.

[140]*Cotton*, 490 U.S. at 186-87.

[141]*Rodriguez*, 660 F.3d at 1195. The *Rodriguez* court acknowledged that states did not technically "regulate" well spacing, but that the federal government adopted state well-spacing standards, *id.* (citing *Cotton*, 490 U.S at 206, n.9 (Blackmun, J., dissenting))

and that federal regulations addressed well spacing as well, *id.* (citing *Cotton*, 490 U.S at 186 n.16) (emphasis added).

[142]*Id*.

[143]*Id*.

[144]*Id.* at 1199 (internal citations omitted).

[145]*Id.* at 1199-200.

[146]*Cotton,* 490 U.S. at 185 (internal citations omitted).

[147]*Id.* at 185.

[148]*Id.* at 185 n.15, 190.

[149]*Id.* at 190.

[150]The *Bracker* Court acknowledged the importance of proportionality when it noted that the *state* was reimbursed for the use of *state highways* within the reservation and, thus, the activity in the case involved use of federally- and tribally-funded infrastructure in which the state had no interest. *Bracker*, 448 U.S. at 140, n.6, 150. Further, the *Bracker* court noted that the facts of the case did not involve the state seeking to *recoup costs for services* it provided to the logging company. *Id.* at 150. Thus, the *Bracker* Court implicitly held that state taxes should be proportional to the benefits the state confers on the tribal activity it seeks to tax. Similarly, *Ramah*, the Court noted:

> "[T]he State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax." In *Crow*, the court stated: "[W]e must review the legitimacy of the state's interests, and the relationship of the taxes to achieving those interests." *Crow*, 819 F.2d at 900 (citing *Bracker*, 448 U.S. at 148-49). Further, the holding in *Crow* was that a state's minimal expenditures that benefit a taxed activity was insufficient to avoid finding pre-emption, especially where the state's expenditures on the taxed activity are vastly disproportionate to the taxes it collects, and the court rejected that a state should be allowed to profit from on-reservation mineral development. *Crow*, 819 F.2d at 902 ("It appears that Montana intended, at least to some extent, to use the taxes to profit from the Indians' valuable coal resources.").

[151]Id.

[152]*Cotton*, 490 U.S. at 207 (Blackmun, J., dissenting).

[153]*Id.* at 208. (Blackmun, J., dissenting).

[154]*Id.* at 186.

[155]*Id*.

[156]*Id.* at 204 (Blackmun, J., dissenting).

[157]*Ramah*, 458 U.S. at 837 (citing *Bracker*, 448 U.S. at 142).

[158]Cohen's Handbook, *supra* note 14, at 707, § 8.03[1][d] (citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980)).

[159]*Cotton*, 490 U.S. at 208-11 (J. Blackmun, dissenting).

[160]*Id.* at 168, 173, n.9, 185.

[161]*Rodriguez*, 660 F.3d at 1196 (discussing *Bracker* and *Ramah*).

[162]*Crow*, 819 F.2d at 899.

[163]*Id*.

[164]*See Rodriguez*, 660 F.3d at 1196-98

[165]*See Cotton*, 490 U.S. at 184-86.

[166]*Ramah*, 458 U.S. at 842.

[167]*Bracker*, 448 U.S. at 149-50.

[168]*Cotton*, 490 U.S. at 186-87.

[169]*Id*. at 187.

[170]*Id.* at 185-86, 191.

[171]*Id.*

[172]*Rodriguez*, 660 F.3d at 1185.

[173]*Id.* at 1184, n.13.

[174]*Cotton*, 490 U.S. at 185.

[175]*Id.* at 191.

[176]*Id.* at 187, n.17. The *Cotton* Court differentiated the state taxes in *Cotton* from those in *Montana v. Crow Tribe*, 484 U.S 997 (1988) because in *Montana*: (1) the state tax had a negative effect on the marketability of the tribe's coal; (2) the state tax was "extraordinarily high" which made the combined tribal-state tax twice that of any other state's coal tax; and (3) the state generated "enormous revenues" through its tax. *Cotton*, 490 U.S. at 187, n.17.

[177]*Cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 140 (1982) (stating that a tribes taxing power enables tribal government to raise revenues for essential services).

[178]*See Cotton*, 490 U.S. at 184 (citing *Bracker*, 448 U.S. at 149 and *Ramah*, 458 U.S. at 839-42); *id*. at 206 (Blackmun J., dissenting).

[179]*Id.* at 205 (Blackmun, J., dissenting).

[180]*Id.* at 185-86.

[181]*Id.*

[182]*Id.* at 206 (Blackmun, J., dissenting).

[183]*North Carolina, ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291 (4th Cir. 2010) (quoting *Pacific Gas & Elec. Co. v. State Energy Research Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13 (1983)) (emphasis added).

[184]25 U.S.C. §§ 2103(b) (listing factors Secretary should consider when reviewing tribal mineral agreements).

[185]*E.g.*, 30 U.S.C. § 1701-1759.

[186]43 C.F.R. pt. 3160 (1989), which are regulations that supplement federal management of Indian oil and gas production, pursuant to 25 C.F.R. § 225.1, 225.4, and regulate every aspect of well operation.

[187]*E.g.*, 25 U.S.C. §§ 3501-3506. *See also* 43 C.F.R. pt. 3160.

[188]*Winston v. Amos*, 255 U.S. 373, 391 (1921).

[189]*See*, *e.g.*, *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 335 (9th Cir. 1956) (discussing Congress' authority to delegate authority over Indian matters).

[190]*See*, *e.g.*, *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 369 (1986) ("Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation" and citing *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)); *McElroy v. Pegg*, 167 F.2d 668, 671 (10th Cir. 1948), *cert. denied*, 335 U.S. 817 (1948) (finding that regulation promulgated by Secretary regarding conveyance of Indian land had effect and force of federal law where Congress delegated to Secretary the authority to approve conveyances of Indian land).

[191]*United States v. Wilson*, 789 F.2d 1354, 1359 (9th Cir. 1986) (finding § 2 and § 9 a sufficient basis for Secretary's regulation of treaty fishing rights) (emphasis added). Some courts regard §§ 2 and 9 as a sufficient basis and "source of [the] Interior's plenary administrative authority in discharging the federal government's *trust obligations* to Indians," *Wilson*, 789 F.2d at 1359, and also

provide a statutory basis for the DOI's regulation of Indian land, *id.* at 1402, n.8, and natural resources produced from Indian land, 25 C.F.R. §§ 163, 166. Pursuant to §§ 2 and 9, the Secretary has general regulatory authority over Indian affairs. Section 2 vests the Secretary with "management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2, while § 9 vests the president with authority for "carrying into effect the various provisions of any act relating to Indian affairs," 25 U.S.C. § 9. Under this analysis, the Secretary has authority to regulate state taxation of Indian minerals as part of his general authority over Indian affairs.

[192]*See*, *e.g.*, *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 749 (10th Cir. 1987) (finding that §§ 2 and 9 do not, by themselves, authorize the Secretary to promulgate a game code for hunting, but those sections combined with a treaty right does confer such authority) (collecting cases). Courts that do not regard §§ 2 and 9 as a basis for Secretarial regulation of Indian affairs require that a Secretarial "regulation must be reasonably related to some … specific statutory provision," *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 665 (9th Cir. 1976), other than these sections. Here, there are two sources of authority that when combined with §§ 2 and 9, grant the Secretary the authority to regulate state taxation of tribal oil and gas.

[193]*See Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987).

[194]*See Santa Rosa Band of Indian v. Kings County*, 532 F.2d 655, 665-66 (9th Cir. 1976). In *Santa Rosa*, a county attempted to impose its zoning and building ordinance on Indian trust land and tribal members sued to enjoin the county from enforcing its ordinances. *See id*. The Secretary had taken the lands at issue into trust pursuant to 25 U.S.C. § 465, which authorizes the secretary to purchase land for Indians and to take title to such land in trust. *Id.* at 658. The Secretary chose to immunize the Indian lands from local ordinances, like county zoning and building ordinances. *Id.* The *Santa Rosa* court held that the Secretary's regulations were authorized by Sections 2 and 9 in combination with 25 U.S.C. § 465 (year). *Id.* at 665-66. The court reasoned that because the Secretary acquired the lands as trust lands and trust lands are generally immune from state regulation, then, the Secretary's regulation immunizing the trust land at issue from local ordinances was reasonably related to § 465. *Id.*

[195]The Secretary's duties extend to both tribal and individually owned minerals. Tribes are beneficial owners of land and subsurface minerals, where the land and is conveyed by treaty and held in trust for the benefit of tribes. *United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyoming*, 304 U.S. 111, 116-17 (1938). Similarly, Indian allotment owners whose allotment is restricted against alienation also own the subsurface minerals associated with the allotment, unless a mineral estate is reserved for non-Indian ownership by statute. *United States v. Bruisedhead*, 248 F. Supp. 99, 1000-002 (D. Mont. 1966).

[196]*See*, *e.g.*, 25 C.F.R. pts. 200, 211, 212, 225 (implementing various statutes governing tribal oil and gas development).

[197]*Northern Arapahoe Tribe*, 808 F.2d at 748 (quoting *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977)) (emphasis added).

[198]25 U.S.C. § 2103(b).

[199]*Id*. § 225.3.

[200]*Id*. § 2103(b).

201*Id*. § 225.3 states:

> In the best interest of the Indian mineral owner refers to the standards to be applied by the Secretary in considering whether to take *administrative action* affecting the interests of an Indian mineral owner. In considering whether it is 'in the best interest of the Indian mineral owner' to take a certain action (such as approval of a minerals agreement or a unitization or communitization agreement) the Secretary shall consider any relevant factor, including, but not limited to: *economic considerations*, such as date of lease or minerals agreement expiration; probable financial effects on the Indian mineral owner; need for change in the terms of the existing minerals agreement; *marketability of mineral products*; and potential environmental, social and cultural effects. (Emphasis added.)

[202]*See Northern Arapahoe Tribe*, 808 F.2d at 749, 750.

[203]30 U.S.C. § 1701(b)(4) (stating that the United States has a has a "trust responsibility … for the administration of Indian oil and gas resources"). *See also Pawnee*, 830 F.2d at 190 (FOGRMA creates the government's general fiduciary obligation towards Indian with respect to the management of oil and gas leases, and revenues therefrom).

[204]25 U.S.C. § 3504(e)(6).

[205]*See*, *e.g.*, *Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. 629, 643-44 (Fed. Cl. 2006); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 56 Fed. Cl. 639, 648 (Fed. Cl. 2003); *Cheyenne-Arapaho Tribes of Okla. v. United States*, 966 F.2d 583, 588-89 (10th Cir. 1992); *Jicarilla Apache Tribe v. Supron Energy Corp*., 728 F.2d 1555, 1563 (10th Cir. 1984); *Kenai Oil & Gas, Inc. v. U.S. Dep't of the Interior*, 671 F.2d 383, 386 (10th Cir. 1982).

[206]*Youngbull v. United States*, No. 31-88 L, 1990 Cl. Ct. Lexis 3, at *21 (Cl. Ct. Jan. 4, 1990).

[207]*See*, *e.g.*, *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1040-41 (Fed. Cir. 2012).

[208]*E.g.*, *id.* 1029, n.11; *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003). *See* Cohen's Handbook, *supra* note 14, at 427, n.73, § 5.95[2] (collecting cases).

[209]*United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011).

[210]*Id.* at 2343 (Sotomayor, J., dissenting).

[211]*Id.* at 2325.

[212]Restatement (Second) of Trusts § 181 (Westlaw 2012).

[213]*Id.* § 176.

[214]*Cheyenne-Arapaho Tribes of Okla*., 966 F.2d at 589-90.

215*Youngbull v. United States*, No. 31-88 L, 1990 Cl. Ct. Lexis 3, at **21, 27 (Cl. Ct. Jan. 4, 1990).

[216]*See*, *e.g.*, *Kenai Oil & Gas, Inc.*, 671 F.2d at 386.

[217]*Cheyenne-Arapaho Tribes of Okla. v. United States*, 966 F.2d 583, 588-89 (10th Cir. 1992).

[218]966 F.2d at 589 (partially quoting *Kenai Oil & Gas, Inc. v. U.S. Dep't of the Interior*, 671 F.2d 383, 386 (10th Cir. 1982) (emphasis added). *See also Montana v. Blackfeet Tribe*, 471 U.S. 759, n.5 (1985).

[219]*See Shoshone Indian Tribe*, 56 Fed. Cl. at 643-44 (discussing *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) and *United States v. Navajo Nation*,

537 U.S. 488, 491, n.16 (2003)). Litigants in *Shoshone* conceded they could not make a claim for profit maximization, but never litigated the matter. *Id.* at 639.

[220]537 U.S. at 491, n.16.

[221]*See Cotton,* 490 U.S. at 179.

[222]*Navajo*, 537 U.S. at 493.

[223]*Cotton*, 490 U.S at 177-83.

[224]*See United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

[225]*See* COHEN'S HANDBOOK, *supra* note 14, at 997, § 15.03.

[226]*See* 25 C.F.R. § 211.1 (stating that regulations at 43 C.F.R. § 3160 supplement regulations applicable to Indian minerals) and 43 C.F.R. ch. 3160, subpt. 3162 (listing requirements that mineral extractors keep wells productive and extract minerals in a way that protects mineral resources other natural resources, and environmental quality).

[227]*See*, *e.g.*, *United States v. Minnesota,* 270 U.S. 181, 194 (1926).

[228]*United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985) (en banc).

[229]*See*, *e.g.*, 270 U.S. at 194.

[230]*Northern Arapahoe Tribe*, 808 F.2d at 748 (quoting *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977)).

[231]*Geraghty v. U.S. Patrol Comm'n*, 719 F.2d 1199, 1213 (3d Cir. 1983) (collecting cases).

[232]*See Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 665 (9th Cir. 1976).

[233]*See* 28 U.S.C. § 1360(b):

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute *or with any regulation made pursuant thereto*; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(Emphasis added.) *See also* 25 C.F.R. § 1.4 (year), which states**:**

> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.
>
> (b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas *adopt or make applicable to Indian lands all or any part of such laws*, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section *as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property*. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate. (emphasis added).

[234]*E.g.*, *Fort Mojave Tribe v. San Bernadino County*, 543 F.2d 1253, 1257 (9th Cir. 1976). *Cf. Oklahoma Tax Comm'n v. Texas Co*., 336 U.S. 342, 350 (1949) (upholding validity of state tax on non-Indian lessee's production of Indian minerals). It is important to note that both of these decisions reasoned that the state tax did not burden the tribe or the tribe's ability to levy its own tax, which is not the case with MHA Nation.

[235]*See Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962).

[236]*Id.* at 47-48.

[237]*Id.* at 49-50.

[238]*Id.* at 57-58.

[239]*United States v. Kagama*, 118 U.S. 375, 384 (1886).

[240]*New York v. Shinnecock Indian Nation*, 686 F.3d 133, 143 (2d Cir. 2012) (Hall, J. dissenting) (citing *Organized Village of Kake v. Egan*, 369 U.S. 60, 71-75 (1962) (considering the evolution of "the relation[s] between the Indians and the States" over the course of United States history and the resulting changes to state jurisdiction over tribes).

[241]*Id.*

[242]*Id*. at 902 (internal citation omitted).