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Indian Law - Mineral Taxation - Are State Severance Taxes Preempted When Imposed on Non-Indian Lessees Extracting Oil and Gas from Indian Reservation Land - Cotton Petroleum Corporation v. New Mexico

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INDIAN LAW—MINERAL TAXATION—Are State Severance Taxes Preempted when Imposed on Non-Indian Lessees Extracting Oil and Gas from Indian Reservation Land? *Cotton Petroleum Corporation v. New Mexico,* 109 S. Ct. 1698 (1989).

Cotton Petroleum (Cotton), a non-Indian company, extracted and marketed oil and gas pursuant to five leases entered into with the Jicarilla Apache Tribe (Tribe).[1] Cotton's leases were located on the Jicarilla Apache Reservation, a reservation encompassing 742,135 acres of tribal trust property[2] in northwestern New Mexico.[3] The Indian Mineral Leasing Act of 1938 authorized execution of the mineral leases subject to approval by the Secretary of the Interior.[4] Royalties, rents and a severance and privilege tax from the mineral leases comprised approximately 90% of all Tribal revenues.[5]

Tribal severance and privilege taxes approximated 6% of the value of reservation produced oil and gas.[6] Additionally, New Mexico imposed five oil and gas taxes approximating 8% of production value.[7] Hence, off-reservation oil and gas was taxed at the state rate of 8%, whereas on-reservation wells were burdened with a combined state and reservation rate of 14%.

Cotton brought suit in a New Mexico state court claiming the multiple taxation was an impermissible burden on interstate commerce.[8] The district court rejected the commerce clause theory and concluded New Mexico's severance taxes were not preempted by federal law.[9] To grant preemption, the state tax must adversely impact the Tribe so as to interfere with tribal sovereignty.[10] However, the district court found no detrimental impact on the Tribe.[11] Instead, evidence showed

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1. Cotton Petroleum v. New Mexico, 109 S. Ct. 1698, 1703 (1989).
2. *Id.* at 1702. Tribal trust property is land owned by the federal government but held in trust for the Indians. *See generally* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians,* 27 STAN. L. REV. 1213 (1975).
3. *Cotton,* 109 S. Ct. at 1702.
4. The Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982). "Unallocated lands within any Indian reservation . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians . . . ." *Id.*
5. *Cotton,* 109 S. Ct. at 1725 (Blackmun, J., dissenting).
6. *Cotton,* 109 S. Ct. at 1703. Merrion v. Jicarilla Apache Tribe established the Jicarillas' authority to impose a severance tax. The tribe's power to tax derives from "[a]n inherent power necessary to tribal self-government and territorial management." 455 U.S. 130, 141 (1982).
7. *Cotton,* 109 S. Ct. at 1703.
8. Cotton Petroleum v. State, 106 N.M. 517, 519, 745, P.2d 1170, 1172 (1987). Cotton's primary argument centered on a footnote in *Merrion,* 455 U.S. at 158-59, n.26. The footnote mentioned that a state tax not commensurate with services provided might be invalid under the commerce clause. *Id.* In rejecting this argument, the Court found the Jicarillas received equal or greater per capita state expenditures than do non-Indians. Also, no constitutional requirement exists that revenues must equal expenditures. *Cotton,* 109 S. Ct. at 1714.
9. Jurisdictional Statement, App. at 17-18, *Cotton,* 109 S. Ct. 1698 (1989).
10. *Cotton,* 109 S. Ct. at 1712-13.
11. Jurisdictional Statement, App. at 17, *Cotton,* 109 S. Ct. 1698 (1989).

Cotton, not the Tribe, was burdened by any additional tax.[12] Expert testimony demonstrated the Tribe could charge even higher taxes. The ability to raise taxes was seen as further evidence that the state taxes did not affect the Tribe.[13]

In affirming the district court, the New Mexico Court of Appeals rejected any federal preemption of state taxes. The court of appeals cited evidence of additional drilling and continuous production as further verification that New Mexico's taxes did not inhibit Tribal self-sufficiency or economic development.[14]

Upon granting certiorari, the Supreme Court affirmed the New Mexico Court of Appeals judgment. Specifically, the Court held that non-Indian lessees may be subjected to both state and Indian severance taxes for production of oil and gas on Indian reservation land.[15]

Cotton Petroleum Corporation v. New Mexico distinguishes prior analysis of state tax preemption in the sphere of Indian law. This casenote analyzes and questions the distinctions drawn between *Cotton* and previous case law. The Court's failure to see New Mexico's severance tax as negatively impacting the Tribe leaves Indian preemption analysis in a confusing and inconsistent state.

BACKGROUND

A state's ability to tax on-reservation oil and gas produced by non-Indians has vacillated significantly over the last 100 years.[16] The intergovernmental immunity doctrine contributed to this fluctuation in state taxation. The theory behind the doctrine was that " 'any tax on income a party received under a contract with the government was a tax on the contract and thus a tax 'on' the government because it burdened the government's power to enter into the contract.' "[17]

In the early twentieth century, state taxes on reservation produced minerals were consistently held void under the intergovernmental immunity doctrine.[18] The intergovernmental immunity doctrine was best exemplified by *Gillespie v. Oklahoma.*[19] The *Gillespie* Court found that taxes on profits a party realized from contracts with the government burdened the government.[20]

In 1938, *Helvering v. Mountain Producers Corp.* overruled *Gillespie* finding that non-discriminatory taxing had too attenuated an effect on

12. *Id.*
13. *Id.*
14. Cotton Petroleum v. State, 106 N.M. at 522, 745 P.2d at 1175. The New Mexico Supreme Court initially granted but then quashed Cotton's writ of certiorari. 106 N.M. 511, 745 P.2d 1159 (1987).
15. *Cotton,* 109 S. Ct. at 1713.
16. *Id.* at 1706.
17. *Id.* at 1706 (citing South Carolina v. Baker, 485 U.S. 505, 518 (1988)).
18. *Cotton,* 109 S. Ct. at 1706.
19. 257 U.S. 501 (1922).
20. *Id.* at 506.

governmental functions to support immunity.[21] The aftermath of *Mountain Producers* left states the right to tax non-Indian oil and gas lessees on reservation land provided Congress did not affirmatively preempt the state taxes.[22]

The intergovernmental immunity doctrine represented a judicially-created influence on the states' ability to tax on-reservation activity. Also critically important during this period was Congress' influence. Early federal legislation reflected Congress' intent to assimilate Indians into mainstream society.[23] Notable in this early period is the Act of May 29, 1924 (1924 Act).[24] The 1924 Act granted states authority to tax mineral production on Indian reservation land and extended oil and gas leases beyond a ten-year limit created by earlier legislation.[25] An early Attorney General opinion[26] interpreted the 1924 Act as not applying to executive order reservations such as the Jicarilla Apaches.[27] To remedy this shortcoming Congress passed the Indian Oil Act of 1927 (1927 Act).[28] Under the 1927 Act, oil and gas leasing on executive order reservations was expressly brought within the states' authority to tax.[29]

Abruptly abandoning its assimilationist policy, Congress, in 1934, enacted the Indian Reorganization Act (IRA).[30] The IRA's purpose was to encourage economic development and a return to tribal self-determination.[31] The IRA was seen as a vehicle for Indians to achieve equality with whites, yet still retain their independence.[32]

Inconsistencies surrounding mineral leasing continued after passage of the IRA and led Congress to enact the Indian Mineral Leasing Act of 1938 (1938 Act).[33] Today, the 1938 Act is the legislation most relevant to oil and gas leasing on Indian lands. The 1938 Act has three essential purposes: 1) to achieve uniformity in Indian mineral leasing; 2) to harmonize mineral leasing matters with the IRA; and 3) to ensure Indians the greatest return on their property.[34] Most importantly, the

21. 303 U.S. 376, 386-87 (1938).
22. *Cotton,* 109 S. Ct. at 1706.
23. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 128-32 (1982).
24. Act of May 29, 1924, 25 U.S.C. § 398 (1982).
25. *Id.* The 1891 Act, amended by the 1924 and 1927 Acts and other legislation, was the first legislation to allow mineral leasing of Indian lands, yet limited mineral leasing to 10-year periods. Act of Feb. 28, 1891, 25 U.S.C. § 397 (1982).
26. Cohen, *supra* note 23, at 408 n.34 (citing 34 Op. Att'y Gen. 181 (1924)).
27. The Jicarilla Apache Indian Reservation was established by the Executive Order of February 1, 1887. 1 C. Kappler, Indian Affairs, Laws and Treaties 875 (1904). The 1924 statute applied only to lands leased under the 1891 Act, which required lands to be "bought and paid for" by the Indians. Executive order reservations did not comply with the bought and paid for language.
28. Act of March 3, 1927, 25 U.S.C. §§ 398a-398e (1982).
29. *Id.*
30. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1982).
31. Cohen, *supra* note 23, at 147-49.
32. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973).
33. H.R. Rep. No. 1872, 75th Cong. 3d Sess. (1938).
34. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 767 n.5 (1985). *See also* Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1112-13 (9th Cir. 1981), *amended,* 665 F.2d 1390, *cert. denied,* 459 U.S. 916 (1982) [hereinafter *Crow I*], 657 F. Supp. 573 (D. Mont. 1985), *rev'd,* 819 F.2d 895 (9th Cir. 1987), *aff'd mem.,* 484 U.S. 997 (1988) [hereinafter *Crow II*].

1938 Act is silent on state taxation, leaving open the question of congressional intent.

This question of intent remains crucial in determining federal preemption of state regulation. Preemption concerning Indian affairs is unique among supremacy clause analyses.[35] The difference in supremacy clause analysis reflects the longstanding tradition of Indian sovereignty within the federal system.[36] Courts generally preempt state law when dealing with Indian affairs on the reservation.[37] However, as in the present case, when the state attempts to regulate non-Indians conducting on-reservation business, the analysis becomes complicated.[38]

Preemption of state regulation is tested by two independent, but related hurdles.[39] First, generally state regulation may be preempted by federal law.[40] Second, the state law may impermissibly infringe "on the right of reservation Indians to make their own laws and be ruled by them."[41] Either potential barrier is sufficient to overcome state regulation.[42] However, in recent times the Court has relied on federal preemption rather than tribal sovereignty.[43] Instead of a means of preemption, the right of tribal sovereignty is seen more as a "backdrop" against which the applicable treaties and federal statutes must be read.[44]

A series of recent cases reflect the role federal law and interference with tribal sovereignty have in preempting state taxes. Cases concerning federal law are where the federal government and/or a tribe already has a comprehensive regulatory scheme in place.[45] For example, in *White Mountain Apache Tribe v. Bracker,* Arizona sought to impose a motor carrier and fuel tax on a non-Indian logging company which conducted its entire operation on tribal and Bureau of Indian Affairs roads.[46] Federal regulations governing timber harvesting and maintenance of tribal roads were held to be so pervasive as to preclude state regulation.[47] The Court held that to avoid preemption a state must perform services which justify a state tax.[48] Arizona failed to fulfill this requirement.[49]

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35. *See generally* Cohen, *supra* note 23, at 270-79.
36. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980); *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832).
37. *Bracker,* 448 U.S. at 144.
38. *Id.*
39. *Id.* at 142.
40. *Id.*
41. *Id.* (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).
42. *Bracker,* 448 U.S. at 143.
43. Mclanahan v. State Tax Commission of Arizona, 411 U.S. 164, 172 (1973).
44. *Id.*
45. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Ramah Navajo School Board Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982).
46. *Bracker,* 448 U.S. at 137-38.
47. *Id.* at 148. *See also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).
48. *Bracker,* 448 U.S. at 148-49.
49. *Id.*

A case very similar to *Bracker* is *Ramah Navajo School Board v. Bureau of Revenue of New Mexico.*[50] In *Ramah,* New Mexico closed the only reservation high school, then sought to impose a gross receipts tax on two non-Indian firms constructing a new school.[51] The Court found an insufficient state interest to support New Mexico's tax.[52]

Cases concerning interference with tribal sovereignty consist of instances in which an on-reservation activity is vital to the tribe's economic development.[53] For example, in *Crow Tribe of Indians v. State of Montana,* Montana attempted to impose a severance tax on coal extracted by non-Indian lessees from reservation land.[54] The Ninth Circuit found Montana's severance tax reduced the marketability of Crow coal, thus limiting the tribe's revenue and interfering with tribal sovereignty.[55] This interference coupled with a lack of narrowly tailored state interests dictated preemption of state taxes.[56]

Both *Bracker* and *Crow* reveal that the Court considers preemption in light of a firm federal policy of promoting tribal self-sufficiency and economic development.[57]

> This inquiry [into preemption] is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a *particularized inquiry* into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.[58] (emphasis added)

The foregoing language reflects a balancing test, weighing the various state, federal and tribal interests. These three factors have been identified more pointedly as the degree of federal regulation involved, the regulatory and revenue raising interests of both the state and tribe and finally the degree of state services provided.[59]

Within this balancing test the Court has consistently resolved any statutory ambiguities in favor of the Indians so as to coincide with the policy of promoting tribal independence.[60] Furthering this policy of

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50. 458 U.S. 832 (1982).
51. *Id.* at 834-35.
52. *Id.* at 843-44.
53. *Crow II,* 819 F.2d at 901; California v. Cabazon Band of Mission Indians, 480 U.S. 202, 218-19, 222 (1987).
54. *Crow II,* 819 F.2d at 897.
55. *Id.* at 900.
56. *Id.* at 903. The Ninth Circuit also found Montana's coal taxes were preempted because they interfered with the policies underlying the 1938 Act. *Id.* at 898.
57. *Bracker,* 448 U.S. at 143-44; *Crow II,* 819 F.2d at 898.
58. *Bracker,* 448 U.S. at 144-45.
59. Cohen, *supra* note 23, at 413.
60. *Bracker,* 448 U.S. at 143-44 (citing *Mclanahan,* 411 U.S. at 174-75). In fact, the Ninth Circuit concluded that a conflict between state law and the purpose or operation of a federal statute is sufficient to sustain preemption. *Crow II,* 819 F.2d at 898 (citing *Crow I,* 650 F.2d at 1109).

independence, the Court has rejected the idea that Congress must expressly state any preemptive intent.[61]

PRINCIPAL CASE

In *Cotton Petroleum,* the Court held that New Mexico could impose a severance tax on non-Indian lessees for oil and gas produced on reservation land.[62] More precisely, the Court determined that: 1) the 1938 Act's purpose is simply to provide Indians additional revenue,[63] 2) states are preempted only upon complete state abdication in on-reservation activities,[64] and 3) any negative impact caused by New Mexico's severance taxes was too attenuated to warrant preemption.[65]

The Court determined the 1938 Act's purpose is to provide Indian tribes with additional revenue, not to allow unbridled profit making.[66] Legislative history of the 1938 Act provides scant explanation of congressional intent. The Secretary of the Interior originally suggested the legislation.[67] Both Senate and House Reports rely on a letter from the Secretary to enunciate legislative intent.[68] Cotton relied on the letter's phrase about providing Indians with the "greatest return from their property" as support for a congressional policy to maximize tribal revenue.[69] Reinforcing Cotton's view is a footnote in *Montana v. Blackfeet Tribe of Indians,* stating that the 1938 Act's purpose is to "ensure that Indians receive the greatest return from their property."[70]

However, Justice Stevens writing for the majority, found the phrase to be isolated and deemed it "unfathomable" to conclude Congress intended to remove all state obstacles to profitability.[71] Moreover, the Court distinguished *Blackfeet* as authorizing only preemption of state taxation of Indian tribes, not precluding taxation of non-Indian lessees.[72]

The Court also rejected any bar to state taxation implied by the 1938 Act's silence on preemption, as opposed to the 1927 Act's affirmative approval.[73] Supporting the Court's rejection was the existence of the intergovernmental immunity doctrine at the time the 1927 Act was passed.[74] The 1927 Act expressly authorized state taxation to avoid

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61. *Bracker,* 448 U.S. at 144 (citing Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965)).
62. *Cotton,* 109 S. Ct. at 1713.
63. *Id.* at 1709.
64. *Id.* at 1712-13.
65. *Id.*
66. *Id.* at 1709.
67. *Id.* at 1708.
68. *Id.* (citing S. Rep. No. 985, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938)).
69. *Cotton,* 109 S. Ct. at 1708.
70. *Blackfeet Tribe of Indians,* 471 U.S. at 767 n.5.
71. *Cotton,* 109 S. Ct. at 1709.
72. *Id.*
73. *Id.* at 1710.
74. *Id.*

the intergovernmental immunity doctrine.[75] However, by 1938 the Supreme Court had overruled the immunity doctrine.[76]

Therefore, the *Cotton* majority interpreted Congress' silence on state taxation in the 1938 Act as merely acknowledging the new rule laid down in *Mountain Producers,* i.e., that states could tax non-Indian oil and gas lessees on reservation land provided Congress did not affirmatively preempt the state taxes.[77] The death of the intergovernmental immunity doctrine obviated any need for Congress to affirmatively waive immunity as they had in the 1927 Act.

In addition to determining the 1938 Act's intent, the Court also found that states are preempted only when they totally abdicate from on-reservation activity.[78] Cotton argued that *Bracker* and *Ramah* required the preemption of New Mexico's severance tax.[79] The Court had found in both *Ramah* and *Bracker* that a comprehensive federal regulatory scheme was contrasted with complete state non-involvement in on-reservation activities.[80]

Justice Stevens, in *Cotton,* factually distinguished *Bracker* and *Ramah* in several ways. First, unlike the situation in *Ramah* and *Bracker,* New Mexico provided substantial on-reservation services which justified state regulation.[81] Between 1981 and 1985, New Mexico provided $89,384 in services while receiving $2,293,953 in taxes from Cotton.[82] The Court rejected Cotton's argument that taxes and services must be proportionate, citing the administrative burdens it would cause and the notion that taxation is not based on a *quid pro quo.*[83]

Additionally, contrary to *Ramah* and *Bracker,* the tax burden in this case did not fall on the Tribe.[84] The Court arrived at this conclusion by adopting the lower court's finding that New Mexico's taxes had no adverse impact on tribal development and also by noting an expert's opinion that the Jicarillas could actually raise their taxes.[85]

Finally, the majority distinguished state taxation in *Cotton* because New Mexico regulated the spacing and mechanical integrity of the wells. Therefore, the state did provide a modicum of services making federal regulation merely extensive, not exclusive.[86] The Court found that merely extensive federal regulation did not meet the standard laid out in *Bracker* and *Ramah.*[87]

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75. Indian Oil Act of 1927, 25 U.S.C. § 398c (1982).
76. *See Mountain Producers,* 303 U.S. at 386-87.
77. *Cotton,* 109 S. Ct. at 1710-11.
78. *Id.* at 1712-13.
79. *Id.* at 1711.
80. *Bracker,* 448 U.S. at 148-49; *Ramah,* 458 U.S. at 843.
81. *Cotton,* 109 S. Ct. at 1712.
82. *Id.* (citing Brief for Appellants at 13-14).
83. *Cotton,* 109 S. Ct. at 1712 n.15.
84. *Id.* (citing Jurisdictional Statement, App. at 15).
85. *Cotton,* 109 S. Ct. at 1712.
86. *Id.* at 1712-13. Federal Regulations of oil and gas leasing are in 25 C.F.R. Part 211, 30 C.F.R. Parts 202 and 206, and 43 C.F.R. Part 3162. Brief for Appellants at 5.
87. *Cotton,* 109 S. Ct. at 1712.

After delineating the necessary level of federal regulation to warrant preemption of state taxation, the Court considered the effect of New Mexico's taxes on the Tribe. The Court viewed any state created detrimental impact on the Tribe as too indirect and insubstantial to justify preemption of state taxes.[88] Justice Stevens reasoned that preemption based on such a marginal impact was tantamount to once again endorsing the intergovernmental immunity doctrine.[89]

The Court found no conflict between summarily affirming the preemption of Montana's severance taxes in *Crow* and finding New Mexico's taxes too indirect to justify preemption.[90] The majority viewed Montana's effective tax rate of 32.9% as "unusually large" and clearly distinguishable from New Mexico's 8% rate.[91]

ANALYSIS

The Court lacked adequate information concerning New Mexico's taxation of on-reservation activities to accurately distinguish *Crow*. The limitation on the 1938 Act's purpose as merely providing additional revenue refutes prior case law. By granting preemption only upon complete state abdication in on-reservation activities, the Court contradicted prior preemption analysis.

The finding that New Mexico's severance tax creates no negative tribal impact is at a minimum unsupported and more likely incorrect. The Court simply adopted the lower court's finding of no adverse impact on the Jicarilla tribe.[92] This was in error for two reasons.

Cotton primarily argued throughout the litigation that the commerce clause required state taxes to equal the level of services provided. Preemption was considered only a "backdrop" to the commerce clause theory.[93] As a result, Cotton never introduced evidence showing the taxes' possible detrimental effect.[94] Thus any lack of impact appears to have been based on speculation. A better approach would have been to remand for further findings on the taxes' impact.

Also problematic is the majority's reliance on the district court's finding that Cotton or its purchasers would pay the taxes, hence the Jicarillas were not affected. This same argument was rejected in *Crow*.[95] A tax rate of 14% as opposed to 8% makes on-reservation wells less desirable. So either the reservation leases fewer wells than would be possible without the state tax or there is an additional 6% going to the state instead of the Jicarilla tribe. Either way the reduced desirabil-

88. *Id.* at 1713.
89. *Id.*
90. *Id.* at 1713 n.17.
91. *Id.* at 1713.
92. *Id.* at 1712.
93. Cotton Petroleum v. State, 106 N.M. 517, 519, 745 P.2d 1170, 1172 (1987); *Cotton,* 109 S. Ct. at 1704.
94. *Cotton,* 109 S. Ct. at 1704.
95. *Crow II,* 819 F.2d at 899 (citing *Crow I,* 650 F.2d at 1113 n.13).

ity of reservation wells translates into lower tribal revenues, thus retarding the federal policy of self-sufficiency and economic development.

The Court also thought it important that an expert claimed tribal tax rates on oil and gas leases could still be raised without adversely affecting development.[96] Even so, there is an unknown maximum tax rate at which oil and gas drilling becomes unprofitable.[97] New Mexico's taxes only accelerate the attainable limit on Tribal revenues generated by reservation leases.

A further weakness in the majority's view that New Mexico's taxes do not adversely affect the Tribe is shown by the poorly drawn distinction between *Cotton* and *Crow*. Montana's 32.9% coal tax in *Crow* was perceived as an obstacle impeding tribal economic self-sufficiency through the reduced marketability of coal. Yet the Court viewed New Mexico's 8% rate as too attenuated in its effect on tribal development to adversely affect the Tribe. The Court failed to explain how at some undetermined point between 8% and 32.9% a state tax becomes impermissibly burdensome.[98]

The Court erred not only by finding that state taxes caused no negative impact, but also in its strained interpretation of the 1938 Act's intent. By limiting the 1938 Act's purpose "[t]o provid[ing] Indian tribes with badly needed revenue..."[99] the Court significantly shifted the previously perceived intent of the 1938 Act. Earlier case law found that the 1938 Act's intent was "to ensure that Indians receive the greatest return from their property."[100] This earlier interpretation of intent is more accurate. The statute must be interpreted in light of the greater policy of promoting tribal self-sufficiency and economic development.[101] A policy maximizing tribal resources promotes tribal self-sufficiency and economic development more completely than simply providing badly needed revenue.

Allowing New Mexico to tax mineral leases artificially lowers the maximum Jicarilla tax which can be imposed. This contradicts the purpose of promoting tribal self-sufficiency and ignores the chronology of legislation leading up to the 1938 Act. Four years before the 1938 Act, the Indian Reorganization Act brought an end to assimilation and began a policy of encouraging economic development and self-determination. The 1938 Act was intended to "bring all mineral-leasing matters in harmony with the IRA",[102] i.e., to promote tribal economic development. However, by allowing state taxation the Court limited tribal economic development and contravened Congress' intent.

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96. *Cotton*, 109 S. Ct. at 1712.
97. *Id.* at 1725 (Blackmun, J., dissenting).
98. *Id.* at 1725-26.
99. *Cotton*, 109 S. Ct. at 1709.
100. *Blackfeet Tribe of Indians*, 471 U.S. at 767 n.5.
101. *Bracker*, 448 U.S. at 143-44.
102. *Blackfeet Tribe of Indians*, 471 U.S. at 767 n.5.

A contrary interpretation of the 1938 Act's intent still mandates federal preemption of the New Mexico taxes. Statutory ambiguities are to be resolved in favor of the Indians.[103] This liberal rule of construction necessitates preemption, even if, as the Court found, a contrary legislative intent was more probable.

Finally, the majority's requirement that only complete abdication of state activities on the reservation will result in preemption seems unduly harsh. By requiring total abdication the Court has contravened *Bracker*'s admonition against applying a "mechanical or absolute" analysis. The Court was unwilling to examine the extreme disproportion between taxes paid and services received or recognize that the federal and tribal regulation of leasing is almost exclusive. Both a lack of state services and a comprehensive regulatory scheme are key elements in prior preemption cases. Instead, by not examining the federal regulatory scheme and dearth of state services, the Court created a "rigid rule" for preemption as opposed to the "particularized inquiry" required in prior cases.[104]

This absolutist approach raises doubts as to the continued vitality of *Bracker*'s balancing test.[105] To engage in a balancing test requires a particularized inquiry into the degree of federal regulation involved, the regulatory interests of both state and tribe, and the degree of state services provided. In *Cotton,* the federal and Indian interests favored preemption.

As previously noted, a comprehensive regulatory scheme is in place. Further regulation is provided by the Jicarilla Apaches' own constitution and statutes.[106] The Tribe also had an obvious additional interest in maximizing oil and gas revenues, as they generate the vast majority of Tribal income. Combined, these interests strongly outweighed New Mexico's meager level of services and regulatory interest. New Mexico's primary interest appears to have been generating additional revenue through taxation without the necessary provision of services.[107] Thus under the Court's balancing test the superior federal and tribal interests mandate preemption of the state taxes.

CONCLUSION

Cotton Petroleum v. New Mexico granted New Mexico the right to impose severance taxes on a non-Indian lessee extracting oil and gas from reservation land. The Court's analysis was premised on inadequate information concerning the effects of state mineral taxation. Cotton, arguing a commerce clause theory, never introduced evidence of

103. *See supra* note 60.
104. *Cotton,* 109 S. Ct. at 1723 (Blackmun, J. dissenting).
105. *Bracker,* 448 U.S. at 145.
106. *Cotton,* 109 S. Ct. at 1723 (Blackmun, J., dissenting).
107. A state must justify its tax by more than a general interest in raising revenue. *Mescalero Apache Tribe,* 462 U.S. at 336.

the impact, if any, state taxation had on the Jicarillas. This lack of evidence means the Court's preemption analysis was predicated on speculation.

Moreover, the decision neglected prior case law and legislative intent. Congress and the judiciary have repeatedly recognized a policy promoting self-sufficiency and tribal sovereignty. Allowing New Mexico's severance tax will reduce Jicarilla revenues and create an impediment to achieving tribal self-sufficiency.

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