Addressing the Harms of Dual Taxation in Indian Country
Through Modernizing the Indian Trader Regulations

February 15, 2017

1) Introduction

The Indian Trader Regulations at 25 C.F.R §140 are an anachronism in the era of Tribal Self-Determination. They have not been updated since 1957. It is no longer necessary for the Department of Interior to license traders on Indian reservations, and the regulations are an unnecessary burden on economic development. However, the underlying law at 25 USC §262 is broad and flexible authority for the Department of Interior to adopt new regulations that would meet the economic development and tax revenue needs of Indian tribal governments in the 21st Century. We urge that the current regulations be replaced, in accordance with recent NCAI Resolution SD-15-045: *Urging the Department of Interior to Address the Harms of State Taxation in Indian Country and Prevent Dual Taxation of Indian Communities* (attached).

In order to ensure long-term stability of tribal communities, there is an urgent need for development of tribal authority to provide government revenue independent of federal appropriations. Tribal governments are taking on increasing levels of government responsibility, but receive hugely inadequate federal funding for roads, schools, police and all government services promised by treaty and the federal trust responsibly. All remaining revenue must come from tribal natural resources or enterprises, and even these limited resources are frequently tapped by unconscionable dual state taxation. The Department of Interior is also severely affected by the lack of funding for tribal programs. We urge swift action.

2) Dual Taxation Causes Significant Harm in Indian Country

State governments provide few services on Indian reservations, but impose taxes on severance of natural resources, retail sales, and increasingly on property such as wind generation facilities. Tribal governments face a losing proposition when forced to collect state taxes: if they impose a tribal government tax, then the resulting dual taxation drives business away. Or, tribes collect no taxes and suffer inadequate roads, schools, police, courts and health care. To add insult to injury, reservation economies are funneling millions of tax dollars into treasuries of state and local governments who spend the funds outside of Indian country. This dilemma is fundamentally unfair to tribal governments, undermines the Constitution's promise of respect for tribal sovereignty, and keeps Indian reservations the most underserved communities in the nation.

The Supreme Court has ruled that tribal governments have the authority to collect sales taxes on any product received by any person within their territorial jurisdiction. This power is limited however, by the practical effect of dual taxation as state governments also have power to collect sales taxes on products without "reservation generated value" that are received by a non-tribal member. A state may not impose a state tax where the product is received on tribal land by a tribal member. See *Washington v. Colville* (1980); *Moe v. Salish & Kootenai* (1976); *Oklahoma Tax Comm. v. Chickasaw* (1995); *Warren Trading Post v. Arizona Tax Comm* (1965) *Central Machinery v. Arizona Tax Comm* (1980).

The Supreme Court has also held that states can tax Indian minerals mined on Indian lands within Indian Country. The Supreme Court's decision in *Cotton Petroleum v. New Mexico*

(1989), has created dual taxation on Indian mineral development within Indian Country that has caused Indian Tribal nations to lose billions of dollars in tax revenue. Tribes are also losing millions of dollars to state taxation of wind and solar facilities on reservations.

The latest problem is internet retail sales. States are losing taxes to internet sales, and 41 states have implemented laws under a common set of tax collection rules called the Streamlined Sales and Use Tax Agreement (SSUTA). The Supreme Court's rules for sales taxes in Indian country conflict with the tax sourcing rules for the SSUTA. *Central Machinery* holds that delivery sales to Indian reservations are not taxable by the state, yet SSUTA sourcing rules are interpreted by states to authorize the collection of taxes on internet sales to reservations. This could force the states to refund taxes to tribal members – similar to the problems with motor fuel tax collection on South Dakota reservations in *Pourier v. South Dakota Dept. of Revenue,* 2004 SD 3. The SSUTA system must allow for collection of tribal sales taxes on internet sales. The Navajo Nation, for example, has a reservation-wide sales tax that applies to all purchases received on the reservation. SSUTA should recognize the primacy of the Navajo Nation sales tax, but does not.

3) Tulalip Litigation Has Inspired a Fresh Look at Dual Taxation From Federal Government

In June of 2015, the Tulalip Tribes filed suit against the Washington State Department of Revenue seeking relief from state sales and use taxes, business and occupation, and personal property taxes at the site of Quil Ceda Village, a tribally developed retail center on tribal trust land, alleging that the state and county taxes in question violate tribal sovereignty, the Indian Trader Laws, (25 U.S.C. 261 et. seq.) and the Indian Commerce Clause to the U.S. Constitution. The United States has intervened in the litigation, supporting the tribal claim, and asserting the federal responsibility as trustee to protect the Tulalip Tribes from dual state taxation.

This federal recognition of the harms of dual taxation by the Department of Interior has inspired a renewed call to address the problem of dual taxation by tribal government leaders. Motivation is also derived from the growing energy development sector in Indian Country, both traditional oil & gas and wind and solar operations, and the imposition of state severance taxes and personal property taxes on these operations.

4) Indian Trader Statutes Provide Authority for Administrative Action to Prevent Dual Taxation

The Indian Trader Statutes are a delegation of Congress's power to regulate commerce with the Indian tribes, and provide broad regulatory authority to the Department of Interior. The text of 25 U.S.C. 262 states:

> "Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

First, federal licensing of traders is growing anachronistic in the modern economy. The federal government has consistently pursued a policy of tribal self-determination since 1970, and federal licensing of Indian traders should defer to tribal business regulation. The federal trader

regulations should be revised to enable tribal regulatory authority, and authorize any person to engage in trade within Indian reservations pursuant to the laws and regulations of the tribal government. The regulations should include a statement of consent to tribal court jurisdiction for resolution of disputes, unless otherwise contracted by the tribal government. Interior considered "modernizing" the regulations thirty-five years ago to include greater deference to tribal business licensing, but never completed the work. *See*, 46 FR 1298-02, January 6, 1981.

Second, as outlined above, the regulations should address dual taxation. The Secretary of Interior's authority to regulate tribal commerce under the Indian Trader Statutes is broad, perhaps limited only by the federal trust responsibility to Tribal Nations. The law applies to "any person desiring to trade with the Indians" including non-Indian customers on tribal lands as well as businesses located on tribal lands. §262 authorizes any rules and regulations the Department of Interior "may prescribe for the protection of said Indians," which includes protection from the harmful effects of dual taxation. Further, the Indian Commerce Clause, the constitutional authority upon which Congress relied to implement the Indian Trader Statutes, authorizes the regulation of all commercial activity involving Indian tribes.

The Indian Trader Statutes, created by Congress in 1834 to prevent unfair treatment of Indian tribes in commercial activities, "show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Warren Trading Post*. The Supreme Court held that sales tax levied on "sales made to reservation Indians on the reservation" by a federally licensed Indian trader are outside of the authority of states. *Central Machinery* established that a state tax on sales made to reservation Indians are preempted simply because the Indian Trader Statutes existed. Despite the fact that the Indian Trader Statutes explicitly forbade unlicensed trading with Indians, the Court held that it was the simple "existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations."

The Supreme Court has not gone further than Central Machinery's interpretation of the Indian Trader Statutes, declining to extend the preemptive power to taxes on sales to non-Indians. As interpreted today, preemption under the Indian Trader Statutes occurs when the activity constitutes a sale on a reservation to a reservation Indian. Federal courts have relied on the old regulations, and these regulations are within the control of the Department of Interior.

5) Indian Trader Regulations at 25 C.F.R. 140 Should Be Amended to Prohibit Dual Taxation

The existing Indian Trader regulations at 25 C.F.R. 140 focus only on the licensing of Indian traders and prohibit certain types of trade. The regulations have not been updated or amended since 1957, and the portion regarding government employees relies on a statute that was repealed in 1996. Given the consistent federal support of tribal self-government since 1970, the increasingly active economies that are found today on Indian reservations, and the need for tribal governments to generate revenue, the National Congress of American Indians urges that it is time for the Department of Interior to update and modernize the regulations.

Action to update the regulations should be stated as a federal preemption of state taxation, and not engage in balancing tests. As the Supreme Court stated in *White Mountain Apache v. Bracker*: "First, the exercise of such authority may be preempted by federal law…. Second, it

may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them," which results in a balancing test of state, federal and tribal interests. Federal courts should not be in the position of applying a vague balancing test involving tribal government interests they do not understand and rarely value. The Secretary of Interior should use the authority under §262 to preempt state taxes and provide clear rules where the taxes and revenues from tribal trust lands are used to benefit tribal governments rather than states.

The amended regulations could be drafted to incorporate the following principles:

1) Federal licensing of Indian traders should defer to tribal regulation, under the federal policy of tribal self-determination, enabling trade under tribal government law and licensing.
2) Consent to Tribal Court jurisdiction for resolution of disputes.
3) Mineral and Energy Taxes – the regulations should pre-empt the application of any state taxes to mineral and energy development in Indian country.
4) Tax Sourcing: Tribal laws should determine tax sourcing of retail sales of all products within Indian country within the following framework:
   a. When the product is received by any purchaser at a business location within Indian country, the sale is sourced to that business location and the tribal taxes apply.
   b. For delivery sales, the sale is sourced to the location within Indian country indicated by instructions for delivery.
   c. These sourcing rules are consistent with the State Streamlined Sales and Use Tax Agreement and widely adopted state practices for determining taxing jurisdiction.
5) Personal Property Taxes – the regulations should preempt the application of state taxes to personal property in Indian country, including equipment such as wind turbines.
6) Tribal-State Agreements – tribal state tax issues are frequently addressed through voluntary agreements. These agreements should be encouraged, but not required. Agreements may be needed for many tribes to implement the collection of internet sales taxes.
7) No Preference for Tribal Tax vs. Lease Revenues – The typical state government objection to tribal tax authority is that tribes would "market a tax exemption" and unduly affect commerce within the state. This argument is specious, as economic analysis shows. Whether goods are taxed or not, the price of such goods will rise to the point the market will bear (in any market segment).[1] Tribes would be incompetent business managers if they sold at huge discounts, and tribes are not interested in providing windfalls for non-Indian businesses or consumers. Tribal governments leasing to non-Indian business can take their revenues on the front end from the lease, or on the back end from tribal taxation. Tribes are increasingly implementing their own taxes, but they should also have the option to price tribal revenues into leases. Tribes will gain approximately the same revenues either way, and it is the need for tribal revenue that provides the rationale for preempting state taxes. In either event, market distortion will not occur. There are non-Indian businesses in border towns that enjoy the competitive disadvantages that exist on-reservation. Their voices should not drive tribal government self-determination policy.

For additional information please contact John Dossett, General Counsel or Julian Nava, Staff Attorney at 202.466.7767 or john_dossett@ncai.org or jnava@ncai.org.

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[1] *Karl Gunnar Persson (10 February 2008). "Definitions and Explanation of the Law of One Price". Economic History Services. Retrieved November 3, 2015.*

25 U.S. Code § 262 - Persons Permitted to Trade with Indians

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

Proposed Amendments to 25 CFR 140: December 1, 2015

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends 25 CFR Part 140 to read as follows:

PART 140 –REGULATION OF TRADE IN INDIAN COUNTRY

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§ 140.1 Which Persons are Authorized to Engage in Trade in Indian Country?

Any person or business desiring to trade with the Indians on any Indian reservation shall be permitted to do so under the laws of the tribal government. Tribal laws must include registration for businesses operating on trust or restricted lands with contact information for responsible parties.

§ 140.2 Consent to Jurisdiction of Tribal Courts and Enforcement

As a condition to doing business in Indian country, each person or business engaging regularly in trade in goods or services in Indian country shall, in accordance with respective tribal laws, be subject to the jurisdiction of the tribal court for the purpose of the adjudication of any dispute, claim or obligation arising under tribal laws, consistent with due process and the following provisions:

a) Parties may agree to alternative venues for dispute resolution through contract.
b) Incidental transactions with American Indians as a part of a larger commercial enterprise will not trigger tribal court jurisdiction. Deliberate and knowing engagement in unique commercial transactions with Indians on a reservation is required.
c) Tribal court jurisdiction is presumed for business activity on trust or restricted lands.
d) Tribal court jurisdiction is established for business activity on fee lands within a reservation when the parties enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements; or

when conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

e) The Bureau of Indian Affairs may take necessary actions to enforce tribal court decisions, including eviction, seizure, and prosecution of trespassers in Indian country.

§ 140.3 What is a tribe's jurisdiction over trade in Indian country?

Tribal jurisdiction regarding trade or business in Indian country includes but is not limited to:

(a) The Indian tribe's jurisdiction over the land and any person or activity within the reservation;

(b) The power of the Indian tribe to tax the land, any improvements on the land, or any person or activity on trust or restricted land;

(c) The Indian tribe's authority to enforce tribal law of general or particular application;

(d) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over nonmembers on Indian land.

§ 140.4 What taxes apply to trade under this part?

(a) Trade and business activity on trust or restricted fee lands shall be subject to any taxation by the Indian tribe.

(b) Trade and business activity on trust or restricted fee lands is not subject to any fee, tax, assessment, levy, or other charge (including but not limited to, business use, privilege, excise, and gross revenue taxes) imposed by any State or political subdivision of a State; provided however, this provision is subject to applicable federal and state law related to taxation of income of individual non-Indians. Fees for utility services are permitted.

(c) Mineral and energy development and any form of natural resources extraction or agriculture on trust or restricted lands are not subject to any fee, tax, assessment, levy or other charge (e.g. severance or gross production tax) imposed by any State or any political subdivision of a state.

(d) Tax Sourcing: Tribal laws determine tax sourcing of sales of all products or services on trust or restricted fee land within the following framework:

a. When the product is received by any purchaser at a business location on trust or restricted land, the sale is sourced exclusively to that business location and the tribal government.
b. For delivery sales, the sale is sourced exclusively to the tribal government jurisdiction on trust or restricted land at the location indicated by instructions for delivery.
c. When subsections (a) and (b) do not apply, these sourcing rules are to be interpreted in a manner consistent with the State Streamlined Sales and Use Tax Agreement and the federal trust responsibility, where the tribal government is treated as a state or territorial government.

(e) Excise Taxes: sales or production of any product on trust or restricted lands are not subject to any fee, tax, assessment, levy or other charge (e.g. motor fuel, tobacco or alcohol excise tax) imposed by any State or any political subdivision of a state.

(f) Personal Property Taxes: All forms of personal property located on trust or restricted lands are not subject to any fee, tax, assessment, levy or other charge imposed by any State or any political subdivision of a State.

(g) Telecommunications: All forms of telecommunications located on trust or restricted lands are not subject to any fee, tax, assessment, levy or other charge imposed by any State or any political subdivision of a State.

(h) Income Taxes: Income earned by any member of a federally recognized tribe who resides and is employed on trust or restricted land is not subject to any fee, tax, assessment, levy or any other charge imposed by a State or any political subdivision of a State.

(i) Tribal-State Tax Agreements: The administration of tribal and state tax laws are frequently addressed through voluntary agreements between tribes and states. Such agreements are encouraged, but not required. As a practical matter agreements may be necessary for the administration of certain taxes, such as taxes on delivery sales.

Authority: Sec. 5, 19 Stat. 200, sec. 1, 31 Stat. 1066 as amended; 25 U.S.C. 261, 262; 94 Stat. 544; 25 U.S.C. 2 and 9, and 5 U.S.C. 301, unless otherwise noted. *Note: look up Statutes at Large. Also 18 USC 437 is repealed.* Cross References: For regulations pertaining to business practices on Navajo, Hopi and Zuni reservations, see part 141 of this chapter.

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The National Congress of American Indians
Resolution #SD-15-045

TITLE: Urging the Department of Interior to Address the Harms of State Taxation in Indian Country and Prevent Dual Taxation of Indian Communities

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, Indian nations and tribes were independent sovereign nations prior to formation of the United States and from the First days of the Republic, the United States entered into treaties and agreements with Indian nations and tribes, acknowledging their status as sovereigns; and

WHEREAS, the Constitution affirms the status of Indian nations and tribes as sovereigns through the Treaty, Supremacy, and Commerce Clauses, and recognizes tribal citizens as "Indians not taxed;" and

WHEREAS, through the Federal Indian traders license, Congress has sought to regulate and protect Indian commerce since 1776; and

WHEREAS, Indian nations and tribes retain our original inherent authority over our members and our territory, including the authority to tax and regulate Indian commerce; *Merrion v. Jicarilla Apache*; *Kerr McGee*; and

WHEREAS, the Supreme Court has ruled that the Federal Indian traders license system pre-empts state taxation on Indian commerce with non-Indian businesses; *Warren Trading Post*; *Central Arizona Machinery*; and

WHEREAS, the Supreme Court has acknowledged that under a balancing test of Federal and tribal interests vs. state interests, state taxation and regulation of reservation generated value is pre-empted; *White Mountain Apache v. Bracker*; *California v. Cabazon*; and

WHEREAS, the Supreme Court has allowed states to tax Indian sales to non-Indians, where the goods are "pre-packaged" and imported to the reservation solely for resale; *Moe v. Salish*; *Colville*; and

WHEREAS, the Supreme Court in *Moe v. Salish & Kootenai* (1976), and *Washington v. Colville Tribes* (1980), and *Cotton Petroleum v. New Mexico* (1989) has issued confusing and extremely harmful rules regarding state taxation in Indian country where state governments can collect taxes in Indian Country; and

WHEREAS, in *Cotton Petroleum*, the Supreme Court held that States can tax Indian minerals mined on Indian lands within Indian Country contrary to the Supreme Court decision in *Blackfeet Tribe v. Montana*, which held that States could not tax Indian mineral development on Indian lands within Indian Country; and

WHEREAS, the Supreme Court's decision *Cotton Petroleum* relies on an erroneous economic analysis which suggested that state taxes would not have negative impacts on oil and gas development on tribal lands, and the case should not be allowed to form policy in Indian country because neither the Tribe nor the United States as trustee were parties in *Cotton Petroleum*; and

WHEREAS, the *Cotton Petroleum* decision has also caused dual taxation on Indian mineral development within Indian Country that has caused Indian Tribal nations to lose billions of dollars in tax revenue that are needed to develop the appropriate infrastructures, *i.e.*, roads, law and order, commercial and housing to accommodate the boom of energy development; and

WHEREAS, Tribal Nations are not able to develop any kind of legacy fund that will allow them to replace the revenue from oil and gas development once the finite oil and gas minerals are mined out; and

WHEREAS, the Supreme Court's erroneous *Cotton Petroleum* analysis is contrary to the Indian Self-Determination Policy, undercuts tribal economic development, undermines tribal self-sufficiency, and violates the United States' trust responsibility to protect Indian trust lands and natural resources; and

WHEREAS, tribal governments and the federal government have a duty to provide the critical government services and infrastructure in Indian country, the federal government has consistently failed in its treaty and trust obligations to fund these services, and tribal communities struggle greatly with inadequate roads & bridges, schools, hospitals, police and justice systems; and

WHEREAS, Indian tribes must rely on enterprises and natural resources to generate revenue, yet most of the tax revenue from tribal lands is funneled into state government coffers; and

WHEREAS, the Supreme Court rulings result in the inequity of dual taxation where tribal tax policies are displaced by the overwhelming economic impact of state taxes and the collection of a state tax prevents tribal governments from implementing our own tax laws; and

WHEREAS, tribal members generally must go off reservation to purchase goods and services, and it is estimated that as much as 80% of tribal members' incomes are spent off-reservation. The state collect all of the revenue generated from Indian country both on-reservation and off, tribal sovereign authority and treaty rights are violated, and reservation economies and government services are greatly harmed; and

WHEREAS, without action, there is great risk that the harms caused by antiquated tax rules in Indian country will be further exacerbated by increases in state taxes and evolving state tax collection systems that target Indian country for state revenue; and

WHEREAS, under the Indian Trader laws at 25 U.S.C. §262, the Department of Interior has authority where "any person desiring to trade with the Indians on any Indian reservation shall … be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

NOW THEREFORE BE IT RESOLVED, that the National Congress of American Indians (NCAI) urges the Department of Interior to exercise its authority under the Indian Trader laws at 25 U.S.C. §262, adopt amendments to the Indian Trader Regulations at 25 CFR §140, to protect tribal governments and their communities from the harmful effects of dual taxation and promote Indian Self-Determination, support economic development, and enhance tribal self-sufficiency, and specifically:

- Pre-empt state taxation of Indian commerce;
- Protect Indian country value from state regulation and taxation; and
- Preserve tribal taxation authority over Indian Commerce, free form state interference; and

BE IT FURTHER RESOLVED, that Congress should enact legislation to support and enhance the Secretary's efforts to promote Indian Self-Determination, Tribal Economic Development and Tribal Self-Sufficiency by supporting tribal taxation and regulatory authority over Indian commerce and preventing dual state taxation of Indian commerce; and

BE IT FURTHER RESOLVED, that the Secretary of the Interior has a trust responsibility to protect Indian oil and gas and mineral development form state regulation and taxation and the Secretary of Interior should make a determination under the Indian Minerals Leasing Act and the Indian Minerals Development Act that:

- Oil, gas and byproducts as well as other minerals on Indian lands are non-renewable trust resources and the United States has a trust responsibility to protect Indian Sovereignty, Self-Determination, and regulatory and taxation authority over oil, gas and mineral development on Indian lands;
- Indian oil, gas and mineral development is essential to Indian Self-Determination, economic development, and economic self-sufficiency;

- The Secretary has a corresponding trust responsibility to protect Indian oil, gas and mineral development from state taxation and regulation;

- In addition, any tribal government sales of oil, gas, and by-products or other minerals should be subject to tribal taxation and regulation, and state taxation and regulations must be pre-empted; and

BE IT FURTHER RESOLVED, that NCAI urges the Secretary of Interior to also adopt amendments to the Indian Minerals Leasing Act and the IMDA Regulations at 25 CFR Parts 211 and 225 so as to prevent States from taxing Indian minerals by making the Parts 211 and 225 regulations exclusive regulations, not subject to State taxation or regulatory interference; (the Secreatry's authority is set forth more fully in the MHA Nation White Paper Attached); and

BE IT FURTHER RESOLVED, that Congress should enact legislation to promote Indian Self-Determination, Tribal Economic Development, and Tribal Self-Sufficiency in the area of Indian oil and gas development, protect tribal taxation and regulatory authority, and preempt state taxation on Indian oil and gas development and overturn the Cotton Petroleum case; and

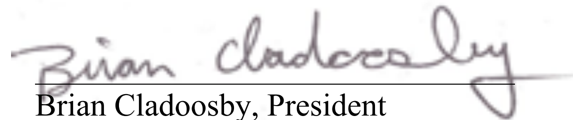
BE IT FURTHER RESOLVED, that the NCAI hereby directs its Executive Staff to assist and facilitate the Tribal Nations' efforts to eliminate dual taxation by States on activities by Indian Nations within their Reservations which includes efforts to amend regulations, obtain a legislative fix to *Cotton Petroleum* and all other tax-related cases and through litigation where appropriate; and

BE IT FURTHER RESOLVED, that the Secretary of Interior shall place the issue of dual state taxation of Indian commerce on the White House Tribal Nations Conference, address the issue with Indian nations and tribes, and develop a plan of action to prevent dual state taxation of Indian commerce; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2015 Annual Session of the National Congress of American Indians, held at the Town and Country Resort, San Diego, CA, October 18-23, 2015, with a quorum present.



Brian Cladoosby, President

ATTEST:

Aaron Payment, Recording Secretary

White Paper of the Mandan Hidatsa and Arikara Nation
on
State Taxation of Indian Oil and Gas Development

Prepared by Fredericks Peebles & Morgan, LLP

October 19, 2015

For the last forty years, federal policy has supported tribal sovereignty and the self-determination movement. The U.S. Congress has enacted many statutes promoting tribal interests and protecting tribal rights and every President since Lyndon Johnson has reaffirmed the government-to-government relationship with Indian tribes. Tribal self-determination has grown immensely, but as tribes have increased their political and economic power, so have intrusions to tribal sovereignty. One such intrusion that continues to undermine the governmental and economic power of tribes is the *Cotton Petroleum* decision decided by the Supreme Court in 1989, allowing states to tax transactions occurring within Indian Country.[1] This decision has robbed tribes of billions of dollars in tax revenue that could otherwise be used to improve the lives of tribal citizens and to secure the future of sovereign governments.

The objective of this Paper is to demonstrate the harms of dual taxation through the ongoing experience of the MHA Nation and then to provide analyses of potential remedies to eliminate dual taxation in Indian Country. The final recommendation is for the Secretary of the Interior to prohibit state taxation of Indian minerals through exclusive federal regulations.

I. INTRODUCTION

Over the last 400 years, despite the clear language in treaties that provide for federal protection and federal economic assistance, tribal economic resources have been diminished and taken. As tribes struggle to revitalize their economies and build new markets in Indian Country, the federal government must honor the commitments that it made in treaties and support tax and economic laws and policies that put tribes on an equal footing with the rest of the country. The case of the Mandan Hidatsa and Arikara Nation ("MHA Nation" or the "Nation") demonstrates the need for tax policy and financing to catch up with self-determination.

The Fort Berthold Reservation is located in the heart of the Bakken Formation, which is the largest continuous oil accumulation within the lower 48 states. Importantly, more than one-third of North Dakota's oil reserves are underneath the Reservation, and the wells there account for about one-third of North Dakota's daily oil production.[2] Despite the known abundance of oil, energy development on the Fort Berthold Reservation still lags behind energy development on non-Indian lands in North Dakota. Yet, the ever-increasing oil and gas activity on the Reservation is taking a tremendous toll on the Nation's roads, infrastructure, crime rates, law enforcement, emergency response and other services. Unfortunately, because current law allows state taxation of on-reservation production, the Nation cannot raise enough revenue to keep up with these

[1] *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989).
[2] U.S. ENERGY INFORMATION ADMINISTRATION, *North Dakota State Energy Profile: Energy on Tribal Lands* (last updated Dec. 18, 2014).

negative impacts. Any increase in tribal taxes of oil and gas production will simply encourage oil and gas developers to look off the Reservation for more cost effective development opportunities.

While North Dakota has boomed, so have the MHA Nation's responsibilities to its members. For example, as a result of dramatically increased traffic resulting from the boom, the roads and infrastructure on the Reservation that are used by the oil and gas industry are rapidly deteriorating. Many of these roads are Bureau of Indian Affairs ("BIA") or Tribal roads, and substantial deterioration of these roads is causing dangerous driving conditions for the general public and oil and gas industry vehicles. Additional infrastructure must be constructed and more MHA Nation law enforcement must patrol the oil and gas activity on the Reservation. All this must be done with little contribution from the State of North Dakota.

The MHA Nation bears the vast majority of these costs while the State collects the majority of the oil and gas tax revenue and spends very little on the needed infrastructure. Under current federal case law, the MHA Nation must share its tax revenues with the State of North Dakota to avoid development-killing dual taxation even though the State provides very limited services on the Reservation. To avoid double taxation and encourage energy development, MHA Nation was forced to enter into an unfair tax agreement with the State. From 2008 to the present, the State has taken almost 1 billion dollars in tax revenues exclusively from energy production on the Reservation—substantially more than what the MHA Nation received in tax revenue during the same period.

The State will not report how these funds benefit the Reservation. We do know that none of the State's share of the tax revenues is used to mitigate any other impacts that oil and gas development has had on the Nation, its citizens, and its natural resources. Meanwhile, the State is currently sitting on a $3.6 billion dollar surplus created from the taxation of energy production,[3] while the MHA Nation struggles to provide basic governmental services and to meet the constant demand for infrastructure repair. To make matters worse, in the Spring of 2015, the State legislature unilaterally voted to reduce the tax rates on oil and gas production, which will reduce the tax revenue to the MHA Nation by almost 700 million dollars over 20 years, thus forcing the MHA Nation to once again decide whether to enact a separate tax thereby pushing development outside of the Reservation or to continue under an unfair tax agreement.

The taxation issues burdening the MHA Nation are widespread in Indian Country. State taxation of on-reservation oil and gas production prevents and interferes with a tribe's right to maximize the economic return for its tribal minerals and ensure both safety and prosperity for its tribal members. The ability of states to tax energy production from Indian lands derives from a line of relatively recent Supreme Court decisions that cut against tribal sovereignty. Although the United States Congress could legislate a prohibition of these types of taxes, Congress has yet to do so despite numerous opportunities. Until state taxation of Indian oil and gas production is limited, tribes will be unable to truly benefit from their resources.

[3] The Office of the North Dakota State Treasurer, "More Operating Balance Data" (*accessed on* October 14, 2015).

II. THE ORIGINS OF DUAL TAXATION IN INDIAN COUNTRY

States generally have broad jurisdiction to tax persons and property within their boundaries. However, both states and their governmental subdivisions are categorically barred from taxing tribes and tribal members within Indian country. *E.g., Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993). Given the categorical nature of tribal and Indian immunity from taxation within Indian country, courts have determined that the legal, and not the economic, incidence of the tax triggers the categorical immunity.[4] As a tax on the non-Indian working interest essentially amounts to a tax on the landowners themselves, a state's ability to tax this interest has been limited by the courts in two important ways. With respect to non-Indian activities on an Indian reservation, the Indian Commerce Clause coupled with the semi-autonomous status of Indian tribes prohibits state taxes on non-Indians engaged in commerce on an Indian reservation if (1) the tax is preempted by federal law or, if (2) the tax interferes with a tribe's ability to exercise its sovereign functions. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.,* 458 U.S. 832, 837 (1982). Although either preemption or interference alone can be a sufficient basis for striking down the applicability of a state tax, the two barriers are usually analyzed in conjunction with each other.

Where a lease is utilized to develop the mineral interest on tribal lands, the non-Indian working interest would not be subject to state taxation if it can be shown that federal law preempts the state tax. Recent Supreme Court decisions have indicated that the determinative issue under the preemption analysis is whether the state is trying to regulate Indian or non-Indian activities. If the regulated activity concerns non-Indian activities on Indian land, the issue is whether state taxation would interfere with the tribe's right of self-government or an express act of Congress. However, if the activity being regulated is solely Indian activity on Indian land, then the state has no power over the Indians and power may only be obtained by an express act of Congress.

In the past, the Supreme Court has analyzed the preemption issue regarding the taxing of leases for mining purposes (25 U.S.C. § 396a), and the taxing of fuel used in connection with harvesting of Indian timber (25 U.S.C. §§ 405–407). *Cotton Petrol. Corp. v. New Mexico,* 490 U.S. 163 (1989); *Bracker*, 448 U.S. 136. In the *Cotton Petroleum* case, the Court found that the state tax was not preempted, while in *Bracker,* the Court found the federal regulatory scheme was so persuasive that it precluded the state from imposing the tax. This determination has deprived tribes from billions of dollars in oil and gas revenues.

Preemption is premised on the idea that tribal governments have an interest in raising revenues for essential governmental services, and that 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.[5] A different result is reached when there is no direct tax on the Indian interest but rather the tax is imposed on the non-Indian interest. In these situations, conflicts arise as both the state and tribal governments seek to tax non-Indian lessees. Such a conflict led to the *Cotton Petroleum* decision where the Supreme Court of the United States held that tribes and states have concurrent taxation jurisdiction over non-Indian lessees as long as the

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[4] *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-459 (1995).
[5] *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980).

state does not substantially burden the tribe or does not intrude too greatly into tribal and/or federal affairs.[6]

The *Cotton* case arose in the context of a lease of Indian mineral interests undertaken pursuant to the 1938 Indian Mineral Lease Act ("IMLA").[7] Under mineral leasing law guidelines set forth in that Act, tribal governments were generally restricted to the role of lessor, leaving tribal governments little control over most leases. For a number of years, states had generally taxed non-Indian leases executed under the 1938 Indian Mineral Lease Act. However, after forty years of taxation, the Interior Department in 1977 determined that states were not allowed to tax mineral leases signed pursuant to the 1938 Act. Subsequently, many tribes began to challenge the continued imposition of these state taxes.

The first case to come before the Supreme Court was *Montana v. Blackfeet Tribe of Indians*,[8] in which the Blackfeet Tribe sued the State of Montana for taxing oil and gas production derived from its Reservation under the 1938 Act. The Supreme Court held that the taxation was not permissible because it fell on Indian lessees. The Court held that nothing in the 1938 Act authorized taxation of Indian lessees and that a contrary holding would contradict the express purpose of the 1938 Act.

Just four years later, the Supreme Court revisited the issue in *Cotton Petroleum v. New Mexico*.[9] The Court held that New Mexico could impose a severance tax upon a non-Indian company on the value of oil and gas it produced from tribal lands even though New Mexico would net millions of dollars more in taxes than it would spend on services to the producer and to the tribe. In *Cotton*, a large non-Indian oil resource development company, Cotton Petroleum, had operated sixty-five oil wells on the Jicarilla reservation land pursuant to the 1938 Act. Both the Jicarilla Apache Tribe and the State of New Mexico collected severance taxes and rental fees concurrently. Moreover, New Mexico collected five additional taxes equaling approximately 8% of the total production value.

The *Cotton* Court held the State tax valid on the grounds that the State was providing limited services to the company, and the company and tribal members received an "intangible benefit" from the State when they left the reservation and used State services off the reservation. The Supreme Court determined that the Tribe and the State had concurrent tax jurisdiction over the non-Indian lessee. In so determining, the Court held that the 1938 IMLA was not designed to remove all barriers to profit maximization. Rather, the 1938 Act was only designed to provide a source of revenue for the tribes. According to the Court, state taxation of non-Indian lessees could only be invalidated if the taxation placed too great of a burden on the tribes or intruded too much into tribal or federal affairs.

The *Cotton Petroleum* Court therefore upheld the state tax for three specific reasons. First, the federal government did not exclusively regulate Indian mineral leasing since the State of New Mexico was found to have regulated the spacing and integrity of the wells on the reservation. Second, the brunt of the taxes fell on the non-Indian producers; therefore, the Court concluded that

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[6] 490 U.S. 163, 189 (1989).
[7] 52 Stat. 347, 25 U.S.C. §§ 396a-396g.
[8] 471 U.S. 759 (1985).
[9] 490 U.S. at 189.

the tax did not negatively impact the tribe. Finally, the State of New Mexico used these taxes to provide services to the tribe. Since then, Indian tribes take issue with all three justifications.

The Supreme Court's decision in *Cotton Petroleum* was considered justified even though the tribe could have otherwise imposed its own taxes on mineral production and that such double taxation would have served to discourage mineral producers from developing oil and gas on Tribal lands. The Court also acknowledged the fact that the federal government extensively regulates oil and gas production on the Reservation. However, the Court determined that there was no proof that the tax would make the tribe's oil and gas unmarketable, that the State was not required to spend on the taxpayer as much money as it collects from the taxpayer, and the federal regulation of oil and gas was not comprehensive or direct enough to preempt New Mexico's tax.

The Court distinguished its result in *Cotton* from the apparently contradictory result in *Blackfeet* by emphasizing that the legal obligation to pay the tax was on the contractors rather than on the Tribe. In both *Blackfeet* and *Cotton,* the non-Indian producer had a legal obligation to pay taxes. Yet, in *Blackfeet,* the State taxed the whole value of the oil, whereas in *Cotton,* the State taxed the value of the oil after royalties to the tribe had been paid. Therefore, the Court held that the New Mexico tax at issue in *Cotton* did not explicitly implicate or burden any tribal interests.[10] Importantly, the Tribe did not bring the *Cotton* lawsuit and the Tribe was not a party to the case. As a result, key facts related to the economic burden on the Tribe were not part of the record before the Supreme Court.

Through *Cotton Petroleum*, tribes discovered that economic burden alone is by no means a guarantee that preemption will be found and the tax will be invalidated.[11] The Supreme Court's decision in *Cotton* has established how courts will determine whether an exemption will be found. Within the parameters of the framework set forth by this case, a court will usually consider three factors in determining if a tax on reservation non-Indians is valid: first, the court will analyze whether the activity being taxed by the state is exclusively regulated by the federal government; second, whether the state is providing any services in return for the money it seeks to collect; and, third, whether the burden of the tax would fall on the tribe or a non-Indian.

III. OPPORTUNITIES TO ELIMINATE DUAL TAXATION IN INDIAN COUNTRY

The most straightforward way to undo the dual taxation burden on tribes that has resulted from the *Cotton Petroleum* decision is through a Congressional legislative fix. In fact, the Supreme Court opened the door for the possibility of a legislative preemption of state taxes on non-Indian activities conducted on Indian lands by discussing the availability of that option in the decision. Since the *Cotton* decision in 1989, Congress has considered numerous bills supported by tribes and tribal organizations that would alleviate the dual taxation problem, yet these bills have never made any progress through Congress due to fierce opposition from states. However, clarity from Congress on the scope of tribal and state taxation authority is overdue. Such clarification would

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[10] As the *Cotton* case demonstrates, the statutory incidence of a tax is important in determining an exemption, however it is not determinative of that issue. For example, the statutory incidence in the tax statute did not save the taxes in *Warren Trading Post, Bracker,* and some of the other cases on point. In those cases, it was determined that the tax burden fell on the tribes, not by operation of state law, but simply by virtue of the tribes' relationships with non-Indian businesses.

[11] *Gila River Indian Community v. Waddell* 91 F.3d 1232 (9th Cir. 1996)

provide federal, state, and tribal governments as well as industry partners with certainty, rather than having to litigate on a costly and often dangerous case-by-case basis.

Congress could develop a legislative fix to the problems associated with dual taxation. One method would be to reaffirm exclusive tribal authority to tax natural resources derived from development on Indian lands, expressly preempting states' ability to tax non-Indian lessees operating on Indian lands. This option is supportive of tribal self-determination and is not without precedent.[12] Under the first option, Congress could also require tribes to fairly reimburse states for any substantiated services that have a nexus to mineral development on Indian lands. Another option is to amend the Indian Mineral Development Act ("IMDA")[13] to clarify that the IMDA preempts state taxation of minerals produced under an IMDA agreement. A third option is to provide federal tax credits for entities conducting business or investing in mineral development on Indian lands that are subject to dual taxation. This option would alleviate the burden for non-Indian developers in Indian Country, but it does not address the underlying issue of state infringement of tribal sovereignty.

To date, trying to achieve a legislative fix through Congress has been unsuccessful due to opposition from states that stand to lose significant income if Congress limits their ability to tax on-reservation activities. Therefore, this Paper examines both judicial and regulatory approaches to resolve dual taxation of oil and gas activities.

A. JUDICIAL FIX: ATTEMPTS TO PRESENT A BETTER CASE

In light of the harmful effects of the *Cotton Petroleum* decision and because the facts related to the burden on the Tribe was not fully briefed before the *Cotton Petroleum* Court, tribes have since litigated cases in lower federal courts with better supporting facts without any relief from the judiciary. The case filed by the Ute Mountain Ute Tribe challenging the State of New Mexico's taxation of non-Indian on-reservation oil and gas operations provides an informative example of why the cases challenging the *Cotton* decision have not provided sufficient relief.

In 2007, the Ute Mountain Ute Tribe ("UMUT") filed a complaint against the Secretary of the Taxation and Revenue Department for the State of New Mexico in the Federal District Court of New Mexico challenging the State's assessment of taxes on oil and gas operations occurring within the Ute Mountain Ute Reservation.[14] The UMUT case was tailored specifically to litigate a question left open by *Cotton Petroleum*: whether a state can assess a tax on non-Indian lessees for on-reservation activities if the state does not provide any services or benefits to the tribe or to its members and where the state's taxes result in an economic burden on the tribe. The UMUT case presented ideal facts to support the Tribe's position: the State taxes result in a substantial economic burden on the UMUT and its members, no tribal members live on the Reservation lands in New Mexico, the State provides no services that directly benefit the Reservation lands or tribal

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[12] *See United States v. Lara*, 541 U.S. 193 (2004) (recognizing Congress's authority to relax restrictions that had been imposed on an Indian tribe's inherent sovereignty.); Indian Gaming Regulatory Act, 25 U.S.C. §2710(d) (expressly prohibiting the assessment of state or local taxes, fees, or charges, on an Indian tribe's gaming activities or on any entity's gaming activities that is authorized by an Indian tribe.).
[13] Pub. L. No. 97-382, 96 Stat. 1928 (codified at 25 U.S.C. §§ 2101-2108).
[14] *Ute Mountain Ute Tribe v. Homans*, 775 F. Supp. 2d 1259 (D.N.M. 2009).

members, all roads within the Reservation lands in New Mexico were unpaved and maintained entirely by the UMUT and the BIA, and the lands are used solely for grazing and oil and gas operations.[15] The only service provided by the State of New Mexico is the regulation of off-reservation infrastructure that makes the transport of oil and gas from the Reservation possible.[16]

Rather than dismissing the case under the *Cotton Petroleum* decision, the District Court first held that the case was sufficiently different from the facts of *Cotton* as to warrant an analysis under the *Bracker* balancing test. After applying the balancing test, the District Court held in favor of the UMUT, holding that the economic burden on the Tribe was substantial, that the federal regulations over the oil and gas operations on the New Mexico Reservations were exclusive, that the State's involvement with and interest in oil and gas operations on the New Mexico lands is minimal, and finally that the indirect service of providing transportation infrastructure off-reservation should not be considered in the *Bracker* analysis.

Unfortunately, the Tenth Circuit reversed this decision on appeal, holding that the case fell more in line with *Cotton Petroleum* than with *Bracker* and *Ramah*.[17] Specifically, the Tenth Circuit conducted its own flexible preemption analysis and held that the State taxes were not preempted because the federal regulations were only "extensive" and not "exclusive," the economic burden on the UMUT was indirect since the legal incidence of the taxes was on non-Indians, and the State's regulation of off-reservation infrastructure was sufficient justification for imposing the taxes.[18] That is, even though UMUT demonstrated that it suffers a significant economic harm and is unable to increase its own taxes and attract new development as result of the State's taxes, the burden is an indirect burden akin to the burden at issue in *Cotton* and is not sufficient justification for ruling that the State taxes were preempted.[19] The UMUT appealed to the Supreme Court for review of the Tenth Circuit decision, but the Court denied certiorari.[20]

Due to a generally hostile environment for tribal interests in federal courts, the likelihood of the Supreme Court overturning the *Cotton Petroleum* decision is extremely unlikely.[21] Therefore, tribes should work with the Secretary of the Interior to establish regulations limiting state taxation of Indian natural resources.

B. REGULATORY FIX

With full acknowledgement of the unacceptable results in federal courts, Indian tribes could turn to the Secretary of the Interior to resolve the issue of dual taxation. Where courts have found federal oil and gas regulations extensive, the Secretary can fill in regulatory gaps through additional regulations or a Secretary Order so that the regulations become exclusive. Such action is within reason as state regulation on Indian lands is extremely limited in scope and subject to both approval and oversight of the federal government. After all, even if the Bureau of Land

[15] *Id*. at 1262-3.
[16] *Id*. at 1288.
[17] *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177 (10th Cir. 2011).
[18] *Id.* at 1203.
[19] *Id*. at 1197-99.
[20] *Rodriguez*, 660 F. 3d 1177, *cert. denied*, 132 S. Ct. 1557 (2012).
[21] *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573 (1996).

Management adopts a state well spacing regulation, it is the federal government that is ultimately responsible in that it must carry out its trust responsibility to tribes. If tribes wish to pursue this solution, they can look at recent regulations and how federal courts treated those regulations as guidance for requesting such action.

In 2012, the Secretary of the Interior promulgated regulations that apply to leases of Indian land entered into under 25 U.S.C. § 415 ("Leases of restricted lands"). 25 C.F.R. Part 162. There, in a decisive instance of clarity and promotion of tribal self-determination, the Secretary expressly preempted state taxes imposed directly upon Indian leases, taxes upon permanent improvements to leased lands, and taxes upon activities occurring on leased lands. *See, e.g.*, 25 C.F.R. § 162.017. Some immediately wondered whether the Secretary could promulgate similar regulations for mineral leases on Indian lands as a way to undo the devastating impact of *Cotton Petroleum*. By foreclosing state and local government taxation of leasing activities on Indian lands, tribes could finally be in a position to undo the dual taxation problem in Indian country.

The Part 162 revised regulations represent a seismic shift in the area of state taxation on Indian lands. Importantly, the Secretary had conducted a generalized *Bracker* analysis in the preamble and concluded that state taxes on Indian leases are preempted under federal law. The regulatory language and the discussion in the preamble seek to establish a clear preemption rule by expressly asserting that the strengths of federal and tribal interests regarding the leasing of Indian lands are such that leases executed under the regulations foreclose state taxation. Such an approach could provide the answer that tribal leaders have been seeking with respect to state and location taxation of Indian mineral development.

Under Section 162.017 of the revised leasing regulations, a state may not tax a tribe or its non-Indian lessee directly for the privilege of leasing property where the transaction occurs on the tribe's reservation. The revised regulations clarify the preemption of state taxes for permanent improvements, activities under a lease conducted on the leased premises, and the leasehold or possessory interest:

> (a) Subject only to applicable Federal law, **permanent improvements on the leased land, without regard to ownership of those improvements**, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.
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> (b) Subject only to applicable Federal law, **activities under a lease conducted on the leased premises** are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.
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> (c) Subject only to applicable Federal law, **the leasehold or possessory interest** is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

25 C.F.R. § 162.017 (emphasis added). Thus, the Secretary clarified that where a tribe leases tribal lands to a non-Indian entity, any permanent activity, the leasehold, and activities thereon are exempt from state taxes. This regulation is a powerful affirmation of tribal sovereignty and facilitates tribal self-determination policies.

With any affront to a state's ability to collect taxes, states challenged the applicability of the revised regulations. Despite an early federal district court win for the Seminole Tribe, the Eleventh Circuit reviewed the decision affirming in part and reversing in part. The following is a summary of the decisions.

1. Federal Court Interpretations of the Revised Leasing Regulations.

The general focus of the legal challenges to the revised leasing regulations has been on the deference that must be given to the Secretary's express preemption of state taxes. In the preamble to the revised regulations, the Secretary undertook a comprehensive evaluation of existing federal law, both statutory and decisional. Additionally, the Secretary outlined the *Bracker* balancing test and then applied it generally to leases under 25 C.F.R. Part 162 and concluded that "[t]he Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation [of Indian leases]." Residential, Business, Wind & Solar Res. Leases on Indian Land, 77 Fed. Reg. 72440–01, at *72447–72448 (December 5, 2012). Unfortunately, courts may not defer to the Secretary's general analysis and express preclusion of state taxes.

The first court that reviewed the revised regulations in depth provided a win for both Indian tribes and the Secretary. In *Seminole Tribe of Florida v. Florida*, 49 F. Supp. 3d 1095, 1098 (S.D. Fla. 2014),[22] the Seminole Tribe brought action against the State of Florida for the imposition of both a state rental tax on rent paid to the tribe by a non-Indian lessee for the use of commercial space at the tribe's casinos (the "Rental Tax") and of a state utility tax on electricity delivered to the tribe on the reservation (the "Utility Tax"). The tribe had entered into 25-year leases in 2005 with two non-Indian corporations to provide food-court operations at each of its casinos. The district court found that federal law preempted both the Rental Tax and the Utility Tax because the federal statutory scheme for Indian leasing is so pervasive that it precludes state taxation of Indian leases. *Id*. at 1100-01.

Relying heavily upon the Secretary's pre-emption analysis, the court distinguished leases under Part 162 from those at issue in *Cotton Petroleum* and *Bracker*. "Unlike in *Cotton Petroleum* or *Bracker*, this Court now has the benefit of the comprehensive analysis performed by the Secretary of the Interior showing how tribal interests are affected by state taxes on leases of restricted Indian land." *Id*. at 1099. In acknowledgement of the Secretary's settlement of the "extensive" though not "exclusive" regulations in *Cotton Petroleum and Ute Mountain Ute Tribe v. Rodriguez*, the court found that the Secretary undertook a comprehensive evaluation of existing federal law and concluded that "'[t]he Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation [of Indian leases].'" *Id*. Because the court found that the Secretary's analysis on the issue of preemption of state taxes on leases of restricted Indian land "merits the full amount of deference available under the law," the district

[22] *aff'd in part, rev'd in part sub nom. Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015).

court found for the Seminole Tribe and deemed it unnecessary to undertake a *Bracker* preemption analysis. *Id. at 1100*.

Thereafter, the decision was appealed to the Eleventh Circuit under the name *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015). Although the Eleventh Circuit agreed with the district court's conclusion, it rejected the deference to the Secretary's ultimate application of *Bracker* and the agency's conclusion that federal law preempts lease-related taxation. *Id*. at 1339. Instead, the Eleventh Circuit applied a *particularized* balancing of the specific federal, tribal, *and state* interests involved. The *Stranburg* court reasoned that because the Secretary's analysis did not examine *Florida's* interests in imposing this particular Rental Tax, the Secretary could not have conducted a proper balancing test in the preamble. *Id*. This decision calls into question whether the Secretary's inclusion of express preemption language in this or other revised regulations in the future can substitute for the particularized inquiry required by *Bracker*.

The *Stranburg* court affirmed the district court's decision that the Rental Tax was preempted. Finding that preclusion best comports with the statutory text and purpose, the relevant Supreme Court case law, and the general canon that statutes be construed in Indians' favor, the court agreed that 25 U.S.C. § 465 precludes Florida from collecting its Rental Tax on the rent payments made by non-Indian lessees of protected Indian reservation land. *Id*. at 1329. The court further held that "even if the statutory exemption did not apply, federal law preempts the Rental Tax in this case under the balancing inquiry outlined in [*Bracker*]." However, the court disagreed with the district court's application of the *Bracker* inquiry because it relied on a conclusion of preemption promulgated by the Secretary of the Interior instead of conducting its own particularized inquiry. *Id*.

Concerning the Utility Tax, the Eleventh Circuit rejected the district court's preemption determination that was based upon *Oklahoma Tax Comm'n*, finding instead that the legal incidence of the tax falls on the non-Indian utility company. *Id*. at 1345. Unlike in the instance of the Rental Tax, the court could discern no pervasive federal interest or comprehensive regulatory scheme covering on-reservation utility delivery and use sufficient to demonstrate a congressional intent to preempt state taxation of a utility provider's receipts derived from on-reservation utility service. *Id*. at 1352. The court concluded that the tribe had not established that Florida's Utility Tax is generally preempted as a matter of law in this case.

2. Confronting Cotton Petroleum

Despite the Eleventh Circuit's application of the *Bracker* test, finding a regulatory solution to the issues presented in *Cotton Petroleum* could still be feasible. First, however, tribes must determine what federal regulatory gaps exist that would preclude a court from determining that extensive and exclusive federal regulation of Indian mineral leasing. Such a determination would provide a tribe with the tools to approach the Secretary and work toward developing "gap regulations" that would constitute the "special factor" found in *Bracker* and *Ramah* but absent in *Cotton Petroleum*.

Tribe should pay particular attention to how the *Stranburg* Court distinguished the land leasing regulations from the regulations at issue in *Cotton Petroleum* by acknowledging that oil

and gas leases are fundamentally different from general land leases in that they allow extraction of products from the land. The court pointed out that the federal regulations concerning Indian oil leases are separate and distinct from the Indian surface land-leasing regulations. *See* 25 C.F.R. § 162.006(b) (noting that this part of the regulations does not apply to "mineral leases, prospecting permits, or mineral development agreements," which are covered by six separate parts of the Code of Federal Regulations). Even if a regulatory approach is taken, it may not overcome the substantial federal court precedent on this distinction.

But through a concerted effort, tribes can work toward developing a regulatory fix. After identifying what aspects of the oil and gas leasing are not exclusively controlled by federal regulations, the Secretary could promulgate "gap regulations" to address the concerns raised in both *Cotton Petroleum and Ute Mountain Ute Tribe v. Rodriguez*. Through these regulations, the Secretary could clarify that federal oversight still exists in instances where the BLM adopts a state regulation because the federal government still has ultimate oversight. Alternatively, the Secretary could clarify the exclusive federal oversight where the BLM adopts state regulations or contracts with state regulators to perform certain functions. After all, the decision to adopt state regulations is within the exclusive realm of the federal government. Further, it is the federal government, not states, that has a trust responsibility to Indian tribes and is subject to a potential action by Indian tribes. Only by first establishing "exclusive" regulations for oil and gas leasing can a challenger then turn its attention to challenging the use and legal incidence of state taxes.

IV. THE SECRETARY HAS THE AUTHORITY TO REGULATE STATE TAXATION OF INDIAN MINERALS

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 right, she can promulgate regulations that immunize a tribe from the offending state law.[23] The Secretary is statutorily authorized to ensure that 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. The Secretary's authority to regulate State taxation of Indian minerals is bolstered by her duty as trustee for those minerals. Because state taxation of tribal oil and gas interferes with tribes' statutory rights to maximum revenues for their oil and gas, and inhibits tribes' ability to mitigate the impact of mineral development by depleting funds available for such mitigation, the Secretary can and should limit state taxation of tribal mineral development.

The Secretary has the statutory authority to regulate state taxation of Indian oil and gas. Some courts find that Section 2 and Section 9 of Title 25, by themselves, vest the Secretary with the authority to regulate and enforce tribal rights secured by treaty or statute. Other courts have found that Section 2 and Section 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. Under either analysis, the Secretary has the authority to regulate state taxation of Indian oil and gas because the IMDA and the Federal Oil

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

and Gas Royalty Management Act[24] both reflect Congress's intent to maximize tribal profits for tribal minerals and the Secretary is authorized to to implement those Congressional intents.

V. THE SECRETARY HAS A DUTY TO ADDRESS STATE TAXATION OF INDIAN MINERALS TO FACILITATE A MAXIMUM RETURN FOR TRIBAL MINERALS.

State taxation of tribal minerals inhibits a tribe's ability to assess and collect its own taxes on mineral production. Ultimately, the Secretary needs to take action to limit state taxes as the taxes diminish the financial return to tribes for their mineral assets. Where a state action adversely impacts tribal trust land or the tribe's ability to facilitate diligent development of its mineral resources, the Secretary, as trustee, can act to safeguard a tribe's interest in diligent development of its minerals and in mitigating the impacts of mineral development on tribal land and infrastructure. The Secretary can accomplish this by limiting a state's share of taxes so that the majority of taxes go to the tribe to preserve its roads, its other infrastructure, and its ability to regulate in response to the environmental, social, and other impacts that come with an oil and gas boom. The Secretary's role as a fiduciary for Indian lands and minerals enhances her authority to limit state taxation so that tribes have tax revenues adequate to fund the infrastructure necessary to develop tribal mineral assets in a safe, efficient, and sustainable manner.

State taxes on Indian oil and gas production adversely impact tribal economies and a tribe's ability to maximize its oil and gas revenues in several ways. With states and local governments taxing on-reservation transactions, tribes lose the opportunity to generate revenues that would benefit their communities. Tribes must reduce their tax rates or forgo taxes entirely. Even then, the threat of double taxation still scares off investors. Tribal tax incentives are out of the question.

Such state taxes also squeeze a tribe's profit margin from both ends—both by decreasing its oil and gas revenue and by increasing the costs associated with oil and gas development such as the provision of law enforcement, tribal regulators, tribal health clinics, and road maintenance. On the Fort Berthold Reservation, oil and gas producers on tribal land benefit from services provided by the MHA Nation, such as road maintenance and police protection, but fail to satisfactorily contribute for such services through taxes because more than half of the taxes assessed are diverted to the State and away from the Tribe. The Secretary has the duty to limit or eliminate the State's taxes so that the MHA Nation can protect its other trust assets, like land and Reservation roads, and so that the Nation can facilitate continued development of its mineral assets.

VI. CONCLUSION

Tribes must apply pressure both to Congress and to the Secretary to take action necessary and correct the wrongs to Indian tribes that have resulted from the *Cotton Petroleum* decision. While a congressional fix is a more difficult path, tribes should continue working to fashion a legislative fix for adverse impact of *Cotton Petroleum* dual taxation on Indian lands. By finding that supporting tribal self-determination requires preempting state taxation of natural resources development on Indian lands, Congress or the Secretary could right a grave judicial error that has impeded Indian economic development opportunities. In addition to action by Congress, the

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[24] 30 U.S.C. §§ 1701-57.

Secretary has both the authority and the duty to eliminate dual taxation in Indian Country. As evidenced by the recent cases involving the Seminole Tribe, any solution may require a multitude of tools available to the Secretary. Through such a concerted and comprehensive effort, the regulations and Secretarial Order may survive state challenges in federal court.