States Versus Tribes: The Problem of Multiple Taxation of Non-Indian Oil and Gas Leases on Indian Reservations

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I. Introduction

Taxation of business operations on Indian land presents a murky issue, particularly when the business operations involve non-tribal members engaging in business on Indian lands. One context where this issue often arises is in the field of natural resources. Because oil and gas are such important commodities, not just on and off American Indian reservations, but across the world, and because oil and gas transactions require a certain level of expertise, tribal dealings with non-Indians in this area are almost inevitable.

The central issue of this Note examines whether states may tax the operations of nontribal on-reservation businesses. Recently, the Ute Mountain Ute Tribe of New Mexico challenged state taxation of oil and gas leases on their lands. While the district court determined that the state had no authority to tax the operations, the Tenth Circuit Court of Appeals in Ute Mountain Ute Tribe v. Rodriguez disagreed, following in the footsteps of the United States Supreme Court in Cotton Petroleum Corp. v. New Mexico. However, that decision was incorrect: state taxes of nonmember oil and gas operations on reservations must be analyzed on a case-by-case basis. Rodriguez should be distinguished from Cotton in a few, significant ways. Rodriguez presents an instance where state taxes on oil and gas production on reservations by nonmembers should be prohibited.

II. Law Before the Case

Taxation of non-Indians participating in business on Indian reservations has been an unanswered question for almost a century. There are three
potential taxation levels for these individuals or entities: federal taxation, state taxation, and tribal taxation.

A. Federal Taxation

The authority of the United States federal government to tax Indian tribes is uncontested. Article I of the U.S. Constitution allows Congress “[t]o regulate Commerce . . . with the Indian Tribes.” To this end, Congress has enacted legislation specifically designed to help clarify the treatment of Indian tribes with regard to federal taxation schemes.

B. Tribal Taxation

The authority of tribes to impose taxes on non-Indians on their reservations is also uncontested. The ability to tax is “an essential attribute of Indian sovereignty” and is “a necessary instrument of self-government and territorial management.” This taxing authority comes from the tribe’s “general authority, as sovereign, to control economic activity within its jurisdiction,” rather than from its power to exclude non-Indians from its lands. Thus, courts continue to uphold tribal taxation of non-Indians entering their reservations for the purpose of engaging in business.

Over time, the criteria for determining whether a tribe may tax non-members within the limits of the reservation has been narrowed to a single test, known as the Montana Test. This test concedes that tribes may not generally regulate non-members within their lands unless: (1) the non-Indians have entered a consensual business relationship with the tribe or its members or (2) the non-Indian conduct directly affects the “political integrity, the economic security, or the health or welfare of the tribe.” While these two exceptions have been narrowed by recent Supreme Court decisions, energy development on Indian reservations can still trigger both exceptions.

7. Id.
In addition to the contraction of these exceptions, tribes have, over time, seen the erosion of their taxing power in general.\textsuperscript{12} This problem is exacerbated by the authorization of federal and state taxes within the jurisdictions of tribal taxes.\textsuperscript{13} The imposition of state taxes hinders the ability of tribes to levy their own taxes, decreases the value to the tribes of oil and gas leases, and makes on-reservation leasing less attractive to contractors.\textsuperscript{14}

\noindent \textbf{C. State Taxation}

\noindent \textit{1. Congressional Approval}

While federal and tribal authority to levy taxes on non-Indians is mostly settled, state authority has remained an open question for nearly a century. Generally, states cannot tax tribes or tribal members engaging in business on Indian reservations.\textsuperscript{15} The exception to this rule occurs when Congress has explicitly authorized taxation.\textsuperscript{16} Courts may not allow state taxation on tribal members on reservations under an ambiguous statute.\textsuperscript{17} However, tribal members are subject to state taxation on activities in which they participate off reservation.\textsuperscript{18} The remaining question, then, concerns state taxation of on-reservation activities of non-Indians.\textsuperscript{19}

Federal authorization of state taxation on Indian reservations has changed dramatically over time. In 1832, the Supreme Court declared that a “[s]tate has no jurisdiction at all within the boundaries of a reservation.”\textsuperscript{20} However, over a century later the Court adjusted this rule to consider the

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\textsuperscript{13} EagleWoman, \textit{supra} note 12, at 50.

\textsuperscript{14} Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 186-87 (1989).


\textsuperscript{16} Id.

\textsuperscript{17} Id.

\textsuperscript{18} Id.


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state’s legitimate interest in regulating non-Indians, and “whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.”

22. Id. at 223.
23. Rodriguez, 660 F.3d at 1192.
25. EagleWoman, supra note 12, at 55.
29. EagleWoman, supra note 12, at 56.
30. Id.
31. Id.
32. Tanana & Ruple, supra note 8, at 18 (citing Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 180 (1989)).
33. Cotton, 490 U.S. at 182.
Congress next addressed oil and gas on Indian lands with the passage of the Indian Mineral Development Act (IMDA), enacted in 1982. 34 Similar to the IMLA, the purpose of the IMDA is to “maximize the economic return to a tribe for its oil and gas,” 35 and, like the IMLA, the IMDA is silent on the issue of state taxation. 36 However, this Act allows the Secretary of the Interior to “promulgate regulations to implement the IMDA.” 37 Again, courts refuse to accept the assertion that this Act repeals the 1924 Act’s authorization of state taxes.

2. Judicial Approval

The Supreme Court has developed a second approach to determine whether a state has jurisdiction. 38 A state may sometimes be able to prove a compelling enough interest to warrant state taxes even without congressional approval. 39 When determining the validity of state taxes, courts must consider tribal sovereignty as a backdrop against which all other laws must be interpreted. 40 Courts should look at: (1) the federal interest in on-reservation activity; (2) the tribal interest in the operation; and (3) the state’s interest in taxing the operation. 41 It is worth noting that a state tax is not immediately invalidated solely because the economic burden falls on the tribe. 42

The first two major Supreme Court decisions to address the problem of double taxation, White Mountain Apache Tribe v. Bracker 43 and Ramah Navajo School Board, Inc. v. Bureau of Revenue, 44 both denied the imposition of state taxes over non-Indians engaging in on-reservation activities. In denying states this authority, both cases made clear that the analysis used to determine whether or not state taxes are preempted is flexible and depends on the facts of the specific case. 45

37. Fredericks, supra note 35, at 58.
39. Tanana & Ruple, supra note 8, at 18.
41. Id. at 149-50.
42. Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177, 1201 (10th Cir. 2011).
43. 448 U.S. 136.
44. 458 U.S. 832 (1982).
Bracker addressed whether a state's motor carrier license and use fuel taxes applied to a non-tribal member logging company operating solely on roads within a reservation.\textsuperscript{46} In resolving this case, the Supreme Court developed a balancing test to determine whose interests were most pervasive and therefore whether state taxes should apply.\textsuperscript{47} This test, often referred to as the Bracker Balancing Test,\textsuperscript{48} weighs the state, federal, and tribal interests at stake by considering three factors.\textsuperscript{49} First, courts consider the extent of the federal and tribal regulations governing the taxed activities.\textsuperscript{50} Second, courts consider whether the economic burden of the tax falls on the non-Indian individual or entity or on the tribe or tribal members.\textsuperscript{51} Third, courts consider the extent of the state interests in the taxation.\textsuperscript{52} Finally, when deciding whether or not the Bracker test applies, courts must consider on whom the legal incidence of the tax falls and where the taxable event occurs.\textsuperscript{53}

In Bracker, the Court decided that the federal and tribal regulations were so pervasive that there was neither room nor reason to impose state taxation or regulations.\textsuperscript{54} The imposition of state taxes would also hinder both the tribe's ability to comply with the sustainability policies prescribed by the federal government\textsuperscript{55} and the federal government's ability to set fees and rates related to the harvest of the timber.\textsuperscript{56} It was undisputed that the incidence of the taxes fell on the tribe.\textsuperscript{57} Finally, the parties offered no evidence of "any regulatory function or services performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation."\textsuperscript{58} The roads cost the State nothing and the

\textsuperscript{46} Bracker, 448 U.S. at 137-38.
\textsuperscript{47} Id. at 145.
\textsuperscript{48} The term “Bracker balancing” was originally coined by the District Court of New Mexico in Ute Mountain Ute Tribe v. Homans, 775 F. Supp. 2d 1259, 1279 (D.N.M. 2009). The Supreme Court has previously used the term “Bracker interest-balancing test.” Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 100 (2005).
\textsuperscript{49} Bracker, 448 U.S. at 148, 150-51.
\textsuperscript{50} Id. at 148. For a discussion of the federal regulatory scheme governing timber activities on the Fort Apache Reservation, see generally id. at 146-50.
\textsuperscript{51} Id. at 151.
\textsuperscript{52} Id. at 150.
\textsuperscript{53} Wagnon, 546 U.S. at 105-106.
\textsuperscript{54} Bracker, 448 U.S. at 152.
\textsuperscript{55} Id. at 149-50.
\textsuperscript{56} Id. at 149.
\textsuperscript{57} Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 184 (1989) (citing Bracker, 448 U.S. at 151).
\textsuperscript{58} Bracker, 448 U.S. at 148-49.
State had no control over them; therefore, the State had no reason to require revenues from their use. Thus, all three prongs of the Bracker Balancing Test tipped in favor of the Tribe and the state taxes were consequently preempted. The next major case to apply the Bracker Balancing Test to preempt state taxes was Ramah, which involved taxation of a non-Indian construction company constructing a school for Indian children on Indian land.

While state taxation is supposedly checked by this Bracker Balancing Test, considering the interests of all parties involved and weighing towards the tribal and federal interests in any instance of ambiguity, “this check appears to have been watered down by the Court over time,” particularly by the seminal oil and gas taxation case, Cotton Petroleum Corp. v. New Mexico.

Cotton represents a major turning point for state taxation of non-Indians on Indian lands. Cotton recognized that tribal taxes on oil and gas severed by non-Indians on Indian reservations, under that specific fact pattern were valid. The Rodriguez court found this case particularly persuasive because it involved the same five taxes.

In applying the Bracker Balancing Test, the Supreme Court substantially distinguished Cotton from Bracker and Ramah, and upheld state taxation of the non-Indian on-reservation activities. The Court determined that because the State “regulates the spacing and mechanical integrity of wells located on the reservation,” the federal and tribal regulatory schemes are extensive, but not exclusive. The State additionally “provides substantial services to both the Jicarilla Tribe and Cotton costing the State approximately $3 million per year,” indicating a legitimate state interest in raising revenues from the on-reservation activities. While the amount of taxes paid by the tribe significantly outweighs the cost of the services to the state, the Court points out that neither Bracker nor Ramah required a proportionality analysis as part of the test; they merely required showing a legitimate state interest.

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61. Sullivan, supra note 9, at 838.
63. Id. at 190-91.
64. Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177, 1188-89 (10th Cir. 2011).
66. Id. at 185 (internal quotations omitted).
interest. Finally, the Court noted that absolutely no economic burden from the taxes fell on the tribe.

In this case, all three factors of the Bracker Balancing Test appear to tip in favor of the State. This puts Cotton on the complete opposite end of the scale from Bracker and Ramah.

III. Statement of the Case

Courts now have an established framework against which they can examine disputes arising between tribes and states. However, most of the major cases have fallen entirely to one side of the analysis: either all three factors tip in favor of the tribe, as in Bracker and Ramah, or all three tip in favor of the state, as in Cotton. But what happens when the facts are less dispositive, when some factors tip in favor of the tribe and others for the state? This question was presented in Ute Mountain Ute Tribe v. Rodriguez.

In Rodriguez, the U.S. District Court for New Mexico and the Tenth Circuit Court of Appeals were asked to decide “whether federal law preempts five state taxes imposed on non-Indian lessees extracting oil and gas from the Ute Mountain Ute Reservation (“Ute Reservation”) in New Mexico.”

The Ute Mountain Ute Tribe (UMUT) is a federally recognized American Indian Tribe with roughly 2000 members. The Ute Reservation spans across three states: New Mexico, Utah, and Colorado. Originally established by treaty in 1868, Congress has twice reduced the size of this reservation; consequently, the reservation is both a treaty and statutory reservation, but not an executive reservation. The portion of the reservation in New Mexico is used only for grazing and the extraction of minerals. There are no “state-regulated or state-maintained roads or other infrastructure” on the reservation land in New Mexico.

67. Id.
68. Id.
69. Id. at 185-86.
70. 660 F.3d 1177 (10th Cir. 2011).
71. Id. at 1179.
72. Id. at 1180.
73. Id.
74. Id.
75. Id.
76. Id.
Under the IMLA\(^\text{77}\) and the IMDA,\(^\text{78}\) the UMUT is authorized, subject to approval by the Secretary of the Interior, to execute mineral leases and mineral development agreements.\(^\text{79}\) As of July 2011, the Ute Reservation hosts 186 active oil and gas wells, operated by twelve oil and gas companies.\(^\text{80}\) Natural gas is the reservation’s main resource; oil is secondary.\(^\text{81}\)

The Tenth Circuit found that the federal laws and regulations concerning oil and gas operations on Indian land, control “virtually every aspect” of the operations on the Ute Reservation.\(^\text{82}\) However, the court conceded that the Oil and Conservation Division of the New Mexico Energy, Minerals, and Natural Resources Department (NMOCD) does have a minor role on the reservation:\(^\text{83}\) the Bureau of Land Management has adopted the same standards for well spacing and well setbacks as those promulgated by the NMOCD.\(^\text{84}\) Additionally, the State provides some optional on-reservation services to non-Indian operators, such as a hearing process for resolving disputes between operators, publicly available geologic records and production records, and records of transfers and sales.\(^\text{85}\) These services are rarely, if ever, actually used.\(^\text{86}\)

In addition to the federal and tribal taxes imposed, the State of New Mexico imposes five state taxes on non-Indian oil and gas operators extracting resources from Indian lands: the Oil and Gas Severance Tax, the Oil and Gas Conservation Tax, the Oil and Gas Emergency School Tax, the Oil and Gas Ad Valorem Production Tax, and the Oil and Gas Production Equipment Ad Valorem Tax.\(^\text{87}\) “Revenues from the Oil and Gas Severance Tax are used to meet the State’s debt and put into the State’s general fund”;\(^\text{88}\) “[r]evenues from the Oil and Gas Emergency School Tax are [also] put into the State’s general fund.”\(^\text{89}\) Revenues from the Oil and

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\(^{77}\) See supra Part II.C.1.

\(^{78}\) Id.

\(^{79}\) Rodriguez, 660 F.3d at 1180-81.

\(^{80}\) Id. at 1181.

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) Id. at 1182.

\(^{84}\) Id.

\(^{85}\) Id. at 1182-83.

\(^{86}\) Id. at 1183.

\(^{87}\) Id.

\(^{88}\) Id.


\(^{90}\) Id.
Gas Ad Valorem Production Tax and the Oil and Gas Ad Valorem Production Equipment Tax are primarily allocated to local governments.\textsuperscript{91} Finally, “[r]evenues from the Oil and Gas Conservation Tax are partly used by the NMOC\textsuperscript{D} to survey and plug abandoned, unplugged, or improperly plugged wells and partly put into the State’s general fund.”\textsuperscript{92} While the NMOC\textsuperscript{D} offers these services to the tribe, the NMOC\textsuperscript{D} has never actually plugged an abandoned well on the Ute Reservation; the state provides no services directly to the UMUT.\textsuperscript{93} In fact, the UMUT has barred the NMOC\textsuperscript{D} from entering the Ute Reservation without permission since 1992 because the UMUT does not recognize the NMOC\textsuperscript{D}’s authority over oil and gas on their lands; rather, the tribe contends that authority is shared by the UMUT, the BLM, and the BIA, to the exclusion of the NMOC\textsuperscript{D}.\textsuperscript{94}

To determine the validity of state taxes, courts must decide whether federal law preempts or allows state taxes. As stated in Part II, the IMLA and the IMDA are silent: Congress neither prohibits nor authorizes state taxes in either of these statutes.\textsuperscript{95} Next, courts must look at the background of tribal sovereignty with regard to the specific Indian tribe at hand. Here, the Tenth Circuit held that the UMUT’s background of sovereignty did not weigh in favor of preemption of state taxes. While this reservation is a treaty and statutory reservation and was immune from state taxation from 1891 until 1924,\textsuperscript{96} the Tenth Circuit held that this did not swing the analysis in favor of the tribe.\textsuperscript{97}

Once courts have considered the relevant federal legislation and the background of tribal sovereignty, courts apply the \textit{Bracker} Balancing Test. This test examines the weight of the state, federal, and tribal interests at issue by looking at three factors: (1) the extent of the federal and tribal regulations governing the taxed activity; (2) whether the economic burden of the tax falls on the non-Indian individual or entity or tribe; and (3) the extent of the state interest in the taxes.\textsuperscript{98}

\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 1272, 1274.
\textsuperscript{94} Id. at 1270.
\textsuperscript{95} See infra Part II.B.1.
\textsuperscript{96} EagleWoman, supra note 12, at 55.
Courts are attempting to establish a bright line rule to determine when the Bracker Balancing Test should be applied.\(^99\) The rule looks at whom the incident of the tax falls on and where the taxable event occurs.\(^{100}\) The district court determined that because the incidence of the tax fell on the non-Indian operators and because at least part of the activity, the severance of the oil and gas, occurred on the Ute Reservation, the Bracker Balancing Test was applicable.\(^{101}\)

Both the New Mexico District Court and the Tenth Circuit followed the analysis established by the Supreme Court and relied heavily on the precedent set by Cotton to determine whether or not the state taxation was valid.\(^{102}\) Each court began by considering the relevant Congressional legislation, namely the IMLA and the IMDA.\(^{103}\) Next, the courts looked at the UMUT’s specific history of sovereign immunity. Both courts found the historical backdrop notably different from the backdrop in Cotton. While the district court found the difference legally significant,\(^{104}\) the Tenth Circuit did not.\(^{105}\)

Finally, the courts considered the extent of the state interests in the taxes. The district court and the Tenth Circuit disagreed on this question. The Bracker test requires that the benefits of state taxation raised through on-reservation activity must specifically apply to the tribe; a general interest in raising revenue is not a sufficient state interest.\(^{106}\) While the district court found in favor of the tribe,\(^ {107}\) the Tenth Circuit found the federal and tribal schemes extensive but not exclusive.\(^{108}\) Citing the regulatory support and off-reservation infrastructure provided by the State of New Mexico, the Tenth Circuit concluded that federal law does not preempt state taxation.\(^ {109}\)

\(^99\). Homans, 775 F. Supp. 2d at 1279.
\(^{100}\). Id. at 1279-80 (citing Wagon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 100 & 107 (2005); Okla. Tax Comm’n v. Chickasaw Nation, 515 U.S. 450, 458 (1995)).
\(^{101}\). Id. at 1280.
\(^{103}\). See Homans, 775 F. Supp. 2d at 1287; Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177, 1190-92 (10th Cir. 2011). See also discussion supra Part II.C.1.
\(^{104}\). Homans, 775 F. Supp. 2d at 1287.
\(^{105}\). Rodriguez, 660 F.3d at 1194.
\(^{107}\). Homans, 775 F. Supp. 2d at 1292.
\(^{108}\). Rodriguez, 660 F.3d at 1196.
\(^{109}\). Id. at 1203.
Following the Tenth Circuit decision, the UMUT appealed to the Supreme Court; however, the Court denied certiorari on February 21, 2012.110

IV. State Taxes Should Not Generally Be Imposed on Non-Indian Oil and Gas Production on Indian Lands

A. This Case Falls Between Cotton on One Hand and Bracker and Ramah on the Other

As mentioned in Part III, the district court and the court of appeals differed in their application of the Bracker balancing test.111 While the district court found that the backdrop of tribal sovereignty and the slightness of the state interest tipped the case in favor of the tribe, the court of appeals found that the backdrop of tribal sovereignty was not legally significant and that the state interest was sufficiently compelling.112

The Tenth Circuit found Cotton to be controlling because that case involved the same five taxes at issue in Rodriguez.113 However, this case is distinguishable from Cotton in a few important ways. First, the Ute Reservation was created by treaty and statute;114 conversely, the Jicarilla Apache Tribe reservation, which was at issue in Cotton, was created by Executive Order.115 Second, while the district court in Cotton found that the economic burden on the tribe was not sufficiently high enough to invalidate the state taxes,116 the district court in Rodriguez found that the economic burden on the UMUT, while indirect, was substantial.117 These distinctions should be considered more carefully to determine which way they tip the scale.

1. Types of Reservations

Reservations are areas of land permanently reserved for a specific tribe as a tribal homeland.118 Historically, reservations have been created three ways: by treaty, by an act of Congress, or by an Executive Order or

111. See supra Part III.
112. Id.
113. Boehl & Mahon, supra note 97, at 44-45.
114. Rodriguez, 660 F.3d at 1180.
116. Id. at 171-72.
117. Rodriguez, 660 F.3d at 1198.
Agreement. While reservations may still be allotted, no treaties have been made between the United States and Indian tribes since 1871. While the different types of reservations are similar, Congress and the courts do not see them as exactly the same. The history of state taxation of on-reservation activities has differed between the different types. While treaty and statutory reservations were immune from state taxes from 1891 until 1924, “as to Executive Order reservations, state taxation of nonmember oil and gas lessees was the norm from the very start.”

The Tenth Circuit in Rodriguez did not find this distinction very important or legally significant. That was incorrect: the period of complete state tax immunity from 1891 until 1924 clearly applies to the treaty and statutorily created Ute Reservation. Executive reservations, like the Jicarilla Apache Reservation in Cotton, did not receive this immunity. In addition, the question of whether or not state taxes are applicable should not even arise under executive reservations. While the question remains ambiguous under the IMLA and the IMDA, 25 U.S.C. § 398c specifically allows state taxation of leases on executory reservations: “[t]axes may be levied and collected by the State or local authority upon improvements, outputs of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations . . . .” Because treaty and statutory leases have no similar provision, courts should infer that the difference in creation and background is significant. Accordingly, they should treat this backdrop as “a thumb on the scales” in favor of tribes holding treaty and statutory reservations, such as the Ute Reservation.

2. Incidence of the Economic Burden

As the dissent in Rodriguez points out, Cotton “strongly suggests” that the severity of the economic burden created by taxes on the tribe should be determined by the finder of fact: generally, the district court. While the district court in Cotton found that the economic burden on the tribe was not

119. Id.
121. Rodriguez, 660 F.3d at 1194.
123. Rodriguez, 660 F.3d at 1194.
126. Rodriguez, 660 F.3d at 1204.
sufficiently high, the district court in *Rodriguez* came to the opposite conclusion. Extreme deference should be given to this conclusion. While the *Rodriguez* court recognizes the importance of this deference, it refuses to follow it.

The economic burden of the tax refers to where the incidence of the tax falls. The economic burden on the tribe can be direct or indirect. A direct burden occurs when the incidence or cost of the taxes falls directly on the tribe, i.e., the tribe pays the taxes. An indirect burden, on the other hand, happens when someone else pays the tax and passes the cost on to the tribe. For instance, the *Ramah* Court determined that an indirect burden fell on the tribe when independent, non-Indian contractors building a school on the reservation included the state gross receipts taxes in the price of their bids. Even though the tax was imposed on another party, because the tax was passed on to the tribe, the tribe bore the economic burden of the tax. By the 1940s, it was already established that the indirect economic burden of a state tax does not, by itself, invalidate the tax. However, the Court in *Oklahoma Tax Commission v. Texas Co.* emphasized the slightness of the tax at issue, implying that a larger tax might be problematic.

Once the determination has been made that the burden of the tax falls on the tribe, courts should look at the proportionality of the imposed taxes to the amount of services rendered. The *Cotton* Court pointed out that neither *Bracker* nor *Ramah* required a proportionality analysis; they merely required a legitimate state interest. However, the state did not have a legitimate interest in either of those cases. Therefore, those cases tipped entirely in favor of the tribes without needing to go further. In cases where there is a legitimate state interest and the economic burden falls on the tribe, either directly or indirectly, courts should take the next step and consider the amount of proportionality in determining the validity of the state taxes.

This does not mean that the amount of the tax or tax burden must not exceed the services rendered. Rather, they must be appropriate under the circumstances. For instance, Cotton Petroleum argued that, while New

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128. *See Rodriguez*, 660 F.3d at 1204.
130. *Id.*
Mexico did provide its operations with almost $90,000 of services between 1981 and 1985, the imposition of almost $3,000,000 of state taxes was disproportionate to the amount of services rendered. The Court rejected this argument for two reasons. First, the services are available to both lessees and the tribe, “the intangible value of citizenship in an organized society is not easily measured in dollars and cents,” and, most persuasively, the actual per capita expenditures for tribe members were equal or greater than the expenditures per non-Indian. Second, there is no constitutional requirement that the tax benefit received by an ordinary commercial taxpayer must equal the amount of his or her tax obligations.

The taxes at issue in Cotton would have been upheld regardless; even if required, the Court would not have reached the proportionality analysis because the state had a legitimate interest and because no economic burden from the tax fell on the tribe. However, the proportionality discussion engaged in by the Court provides a good foundation for developing a proportionality test.

Assuming a legitimate state interest, if the economic burden falls on the tribe, courts should weigh the amount of the burden suffered by the tribe against the amount of services provided. As early as 1982, the Supreme Court speculated that a proportionality assessment might be appropriate. Determining proportionality can be done by considering factors such as how substantial the state’s support is, the number of services available to the tribe (even if the tribe does not actually partake of all of these services), and the per capita state expenditures per tribal member compared to the expenditures per non-Indian. This should be a fact specific, case-by-case analysis turning on the totality of the circumstances; no one metric should be dispositive. Similarly, strict dollar-to-dollar proportionality is not dispositive; rather, this test is a fairness analysis balancing the interests of both parties.

Rodriguez is much more analogous to Bracker and Ramah than it is to Cotton. The federal and tribal regulations available to the oil and gas operators are quite pervasive. Similarly, the NMOCD and the State of New Mexico provide no physical services or infrastructure on the New Mexico

134. Id.
135. Id. at 189-90.
136. Id. at 190.
137. Id. at 169.
138. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 190 n.26 (1982). (“[T]he multiple taxation issue would arise only if a State attempted to levy a tax on [activity on tribal lands], which is more than the State’s contact . . . would justify.”).
lands to either the U MUT or to the oil and gas operators. In fact, New Mexico provides no services directly to the tribe. While the State does offer off-reservation services to the tribe, the tribe has never partaken of these services. The State also offers services such as a hearing process for resolving disputes between operators, but these services have never been used to resolve disputes between operators on the U MUT lands because the tribal and federal remedies are so extensive. The NMOCD budget for the 2007 fiscal year was $11,132,531. It is not possible to fully separate the expenditures for the on-reservation wells from the expenditures off-reservation. The only expense that can be separated is the cost of plugging a well; the NMOCD has not plugged a well on the U MUT land since at least 1992, and there is no evidence that the NMOCD plugged a well on the U MUT land before then. While the benefits of the services offered off of the U MUT land may be substantial, the State cannot identify any expenses specifically connected to the maintenance of tribal wells. Additionally, many of the off-reservation services potentially offered to the tribe, such as publicly available geologic records, would remain open to the on-reservation operators, at little to no additional cost to the State, even if the state taxes were not imposed. For these reasons, the proportionality analysis tips in favor of the tribe and the state taxes should not be upheld.

B. Should Cotton Actually Control?

Overall, Rodriguez is much more analogous with Bracker and Ramah than with Cotton. However, because Cotton and Rodriguez involve the same five taxes, courts and lawyers are quick to assume the analysis is the same. As illustrated in the case at hand, this assumption is unfounded. In Cotton there was no history of tribal immunity from state taxes, the state had a significant state interest, and no incidence of the tax fell on the tribe. In Rodriguez, on the other hand, the tribe historically enjoyed some

140. Id. at 1272.
141. Id.
142. Id. at 1272-73.
143. Id. at 1273.
144. Id.
145. Id.
146. Id.
147. Id. at 1272.
148. Id.
sovereign immunity, the state’s interest was minimal, and the tax incidence affected the tribe.

Homans asks whether Cotton should be broadly construed to hold that oil and gas severances from Indian lands by non-Indians may always be subject to state taxes, regardless of where on the Bracker scale a specific case would fall. If so, a fact specific analysis of each case would be unnecessary. Homans specifically rejects this conclusion, stating that Cotton “did not create a categorical rule” and “the Bracker analysis continues to apply.” Rodriguez implicitly agreed by applying the Bracker analysis: had Cotton created a general rule, the court would have had no reason to employ the Bracker test or indeed partake in any detailed analysis; rather, the court should have merely announced that the taxes were valid based on precedent and Cotton’s categorical rule. Because the Rodriguez court did not do this, that court accepted the premise that state taxes are validated on a fact-specific basis. Thus, reframing the issue in terms of authorization, instead of preemption, is warranted.

C. Authorization Versus Preemption

While all legislation actually deals with whether state taxes are authorized on Indian lands, the courts always ask whether state taxes are preempted. Courts should reframe their phrasing to better align with the real question. While the two questions may sound similar on the surface, they are slightly different in their analyses.

Congress has specifically stated that state taxes may not be imposed without express authorization. Thus, short of express authorization, courts should begin by assuming state taxes are not authorized and determine whether there is a legitimate reason to allow the state taxes, instead of presuming the taxes are valid and looking for a reason to preempt them. While either phrasing should theoretically come to the same conclusion, searching for authorization instead of preemption forces the courts to view the cases in the light most favorable to the tribes, who are generally the disadvantaged party in negotiations.

For instance, in enacting the IMDA, the Congressional Committee drafting the statute declined to include express taxation authority, choosing instead to rely on the Supreme Court’s jurisprudence. This indicates, if

149. Id. at 1286.
150. Id.
anything, Congress’s neutrality on the issue.\textsuperscript{153} This does not indicate a congressional intent to prohibit state taxation, nor does it indicate authorization. The Rodriguez court understood this to mean that, had Congress wished to prohibit state taxation with the IMDA, it would have specifically done so—looking for preemption. However, Rodriguez should have asked if, after the enactment of the IMDA, state taxation was still authorized under the new setup. While that framing would have in no way been dispositive to the case, it would have allowed the court to view the legislation more critically and more favorably to the UMUT. Because congressional approval is the prevailing way to authorize state taxes, this approach would have been more prudent and should be applied in future cases.

\textit{V. Problems of Double Taxation}

Allowing both states and tribes to tax non-Indians engaging in business on reservations creates a unique problem of double taxation.\textsuperscript{154} This problem would never be allowed in multistate or international tax considerations.\textsuperscript{155} “In fact, much of the law in the multistate and international tax fields is concerned with ensuring that income is taxed no more and no less than once.”\textsuperscript{156} In addition to the economic inequities double taxation causes, commentators have raised several other issues resulting from the current tax structure, including the assault on tribal sovereignty, increased disadvantages of doing business on reservations, and advancing the deplorable economic conditions that exist on reservations. Furthermore, this is not an issue that affects just this tribe or this reservations; this issue affects all Indian tribes engaging in business with non-Indians on their lands.

\textbf{A. Assault on Indian Sovereignty}

“The Indian’s power to tax can mean little if the states in which reservations are located are also permitted to impose taxes on the same activities.”\textsuperscript{157} Through jurisdictional reclassifications, tribes have seen their taxing power erode over time.\textsuperscript{158} Through Supreme Court decisions like

\begin{thebibliography}{158}
\item \textsuperscript{153} See id.
\item \textsuperscript{154} Cowan, supra note 15, at 95.
\item \textsuperscript{155} Id. at 94.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Comment, supra note 131, at 507.
\item \textsuperscript{158} EagleWoman, supra note 12, at 50.
\end{thebibliography}
Cotton, tribal economic development has been further impeded. 159 “[A] tribe’s civil regulatory power diminishes the further it moves away from the internal governing of its own members,” 160 and the more external taxes imposed on the tribe the less regulatory power the tribe retains. Without the economic burden of federal and state taxes, tribes would be much better situated to sustain themselves, rebuild economically, and provide for the health and welfare of their members. 161 Because of this, some tribes have argued that courts should disallow state taxes on non-Indians engaged in business on reservations whenever the taxes infringe upon tribal sovereignty, regardless of congressional preemption. 162

The imposition of state taxes similarly hinders tribes’ abilities to govern themselves. Some tribes have argued that regardless of congressional preemption, courts should eliminate state taxes that pose a threat to Indian sovereignty by infringing “on the right of reservation Indians to make their own laws and be ruled by them.” 163 The Supreme Court has already accepted this argument with regard to state laws affecting tribal sovereignty within Indian country in non-tax areas. 164 For instance, in a 1959 action to collect for goods sold on credit, 165 the Supreme Court held that the tribal courts had broad criminal and civil jurisdiction and that the State of Arizona had accepted no such jurisdiction. 166 The Court further held that allowing Arizona jurisdiction “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the rights of the Indians to govern themselves. It is immaterial that respondent is not an Indian.” 167 In 1983, the Supreme Court held that the application of New Mexico hunting and fishing laws to on-reservation activity “would effectively nullify the Tribe’s authority to control hunting and fishing on the reservation.” 168

Oil and gas taxes clearly infringe upon tribes’ ability to self-govern. The state taxes make it difficult for the tribes to fund essential services, such as

159. See id.
160. Tanana & Ruple, supra note 8, at 15.
161. EagleWoman, supra note 12, at 72.
163. Id. (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).
164. Id.
165. Williams, 358 U.S. at 217-18 (ruling on action brought by a non-Indian operating a general store on the Navajo Indian Reservation against a Navajo Indian and his wife to collect for goods sold to them at his store on credit).
166. Id. at 222-23.
167. Id. at 223.
providing for the health and welfare of their members, because the state’s
taxes decrease the ability of tribes to impose their own taxes and
consequently decrease tribes’ tax revenues.169 Additionally, tribal funds are
used to provide oil and gas services, further reducing the amount of money
available to provide essential services to the tribes.170

B. Decreasing Attractiveness of Leasing on Indian Lands

The taxation quagmire created by the imposition of so many levels of
taxation further discourages businesses from engaging in business on tribal
lands.171 Due to problems such as the lack of infrastructure and the
complex and confusing application of commercial laws, businesses are
often already hesitant to operate on Indian lands.172 The possibility of
being taxed by both the tribe and the state makes operating on tribal lands
even less appealing.173 For instance, businesses will receive a lower rate of
return when doing business on-reservation than they will off-reservation,
where they are subject to only state and federal taxation.174 Many utility
companies continue to operate on Indian lands and avoid this problem by
passing the increased cost off to their customers.175 However, the demands
of producers and the high competition within the industry are making this
pass-off more and more difficult.176

Even the Court in Cotton acknowledged that the imposition of state
taxation decreases the profitability of oil and gas leases taken on Indian
lands.177 However, that Court concluded that state taxation similarly
reduces the profitability of off-reservation leases.178 Following its own
precedent, that Court further concluded that the indirect burden on the tribe
caused by the state taxes was insufficient to immunize on-reservation non-
Indian leases from those taxes.179 As explained in this note, that conclusion
was incorrect.

169. Fredericks, supra note 35, at 64.
170. Id.
172. Id.
173. Id.
174. Tanana & Ruple, supra note 8, at 19-20.
175. Id. at 20.
176. Fredericks, supra note 35, at 64.
177. Id.
179. Id.
C. Deplorable Economic Conditions on Reservations

Extreme poverty and other deplorable economic conditions are common on most Indian reservations. In November 2011, for example, the median income of American Indian and Alaska Native households was $35,062, compared with a national average of $50,046. Additionally, the American Indian and Alaska Native poverty rate at that time was 28.4%, versus 15.3% for the nation as a whole. Twenty-two percent of Indians live on reservations, where there are often much worse—living conditions than those in third world countries. The number of Indians living below the poverty line increases dramatically on-reservation, from 28.4% to at least 38% and even up to 63%.

The double taxation problem significantly contributes to these problems. The elimination of state taxes would help bring the tribes into positions where they can “rebuild economically and independently their communities and provide for the health and welfare of tribal members.” This is particularly true with regard to oil and gas operations. Oil and gas are often the only inherent sources of wealth on Indian lands. In fact, the first efforts to allow state taxation of activities of non-Indians on Indian lands stemmed from the identification of oil and gas under those lands. Thus, because the authority of tribes to impose taxes on these activities has not been questioned, the decision to allow state taxes gave birth to the issue of double taxation.

While the imposition of state taxes in some areas may actually benefit tribes by encouraging them to start their own businesses, which would be exempt from state taxes, this is just one example of why state taxes might undeservedly deter tribes from contracting with nonmembers to do business. While tribal businesses spur tribal economic development and

180. Comment, supra note 131, at 491.
182. Id.
184. Living Conditions, supra note 183.
186. EagleWoman, supra note 12, at 72.
188. EagleWoman, supra note 12, at 55.
189. Id. at 56.
enhance tribal self-government, helping to further both goals of the 1934 IRA,\textsuperscript{190} this is not a practical solution in the field of natural resource operations. Because particular expertise and equipment is needed to efficiently extract and manage minerals, it would be almost impossible for tribes to simply start their own production operations, at least in the short term. Thus, tribes are forced to either deal with nonmembers in this area or choose not to develop their natural resources, foregoing the potential profits from production and risking waste of the precious resources.

D. An Issue of Nationwide Importance

Cases such as \textit{Rodriguez} and \textit{Cotton} do not just affect the tribes and states involved in the cases. They affect all tribes with oil and gas reserves on their reservations, and all states in which those reserves are located.\textsuperscript{191} Both states and tribes want to receive as much tax revenue as possible from oil and gas severance taxes.\textsuperscript{192} Also, because of the specialized knowledge and infrastructure required in the production of oil and gas, tribes often have no choice but to engage in business with nonmembers in this field, inexorably implicating the double taxation issue. Additionally, while cases involving Indian affairs may not appear to have widespread ramifications, “the growing importance of commercial ventures on Indian reservations (e.g., casinos, hotels, mineral rights) and their effect on the state and local tax base add significance to such disputes” for all taxing jurisdictions and taxpayers, not just tribes and their members.\textsuperscript{193}

VI. Solutions

The easiest way to solve the problems and inconsistencies of double taxation is through legislation by Congress. First, Congress could explicitly preempt (or allow) state taxes on oil and gas production by non-Indians on Indian lands, either in full or in part. Second, Congress could provide tax incentives to encourage tribes and states to work together to resolve tax issues among themselves.\textsuperscript{194} Congress could also provide tax incentives in the form of tax credits specifically designed to alleviate this problem.

\textsuperscript{190} Cowan, \textit{supra} note 15, at 119-120.
\textsuperscript{192} Id.
\textsuperscript{193} Boehl & Mahon, \textit{supra} note 97, at 45.
\textsuperscript{194} Cowan, \textit{supra} note 15, at 97.
In lieu of specific tax legislation, the federal government could step in to help with the enactment of tax compacts between states and tribes. Compacts are agreements between tribes and states in which the two parties decide to levy one overall tax and divide the proceeds between themselves. However, due to unequal bargaining power between the two parties, tribes often give away a large part of the tax revenues in order to avoid conflict and litigation. A better bargaining process could increase the use and success of tax compacts as well as work towards solving the double taxation problem.

VII. Conclusion

The reasons for preempting state taxation of on-reservation non-Indian oil and gas operations are numerous and, from a policy standpoint, help to increase both the value of the leases and the economic development of Indian tribes. As a matter of law, such taxes should be examined on a case-by-case basis. While Cotton was correctly decided, its application is far from universal. The facts in Rodriguez are much more favorable to the tribe. When the state has legitimate interests and the economic burden of the taxes fall on the tribe, courts should apply a proportionality analysis in addition to the traditional Bracker Balancing Test, weighing not just the level of interest of each party but also the specific burdens and benefits of the taxes on the parties. Additionally, courts should frame the question in terms of whether the state taxes are authorized, not whether they are preempted. These changes to the traditional test will help increase the fairness in oil and gas leases between tribal and non-tribal members as well as promote better cooperation and interaction between all parties involved in such transactions.

195. Sullivan, supra note 9, at 851.