American Indian Law Review

Volume 21 | Number 2

1-1-1997

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Recommended Citation

Richard J. Ansson Jr., *Protecting Profits Derived from Tribal Resources: Why the State of Utah Should Not Have the Power to Tax Non-Indian Oil and Gas Lessees on the Navajo Nation's Aneth Extension: Texaco, Exxon, and Union Oil v. San Juan County School District—A Case Study*, 21 AM. INDIAN L. REV. 329 (1997), <https://digitalcommons.law.ou.edu/ailr/vol21/iss2/5>

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COMMENT

PROTECTING PROFITS DERIVED FROM TRIBAL RESOURCES: WHY THE STATE OF UTAH SHOULD NOT HAVE THE POWER TO TAX NON-INDIAN OIL AND GAS LESSEES ON THE NAVAJO NATION'S ANETH EXTENSION: *TEXACO, EXXON, AND UNION OIL V. SAN JUAN COUNTY SCHOOL DISTRICT* — A CASE STUDY

Richard J. Ansson, Jr.*

I. Introduction

Of course our whole national history has been one of expansion That barbarians recede or are conquered, with the attendant fact that peace follows their retrogression or conquest, is due solely to the power of the mighty civilized races which have not lost their fighting instinct, and which by their expansion are gradually bringing peace into the red wastes where the barbarian peoples of the world hold sway.

— President Theodore Roosevelt¹

As President Theodore Roosevelt's words indicate, expansion of the United States' land base has always been an issue central to the United States' domestic policies.² Indeed, the United States' political and economic well-being has rested on its ability to control its landed interests.³ Likewise, the governmental entity that has controlled the land has also controlled the resources within and upon it.⁴ Such control has enabled the governing

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1. THEODORE ROOSEVELT, *THE STRENUOUS LIFE*, reprinted in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 139, 139 (M. Annette Jaimes ed., 1992) [hereinafter *THE STATE OF NATIVE AMERICA*].

2. See, e.g., JOHN R. HOWE, *FROM THE REVOLUTION THROUGH THE AGE OF JACKSON* 91-174 (discussing how the United States' overriding interest in maintaining and securing its land base helped stimulate the economy while eliminating foreign threat possibilities).

3. *Id.*

4. This resource base is fairly vast and includes minerals, water, agricultural production, livestock production, grazing rights, etc.

entities' citizens to reap the profits generated from those resources. Accordingly, as the United States expanded, the federal government sought to ensure that these priceless treasures remained within their possession and control.⁵

Unfortunately, this federal insurance cost Native Americans. Indeed, as Native American governmental entities lost their lands, they also lost control over their land's 'valuable resources.'⁶ Even on lands retained by the Native Americans, the federal government asserted its power to regulate those resources.⁷ These losses cost the American Indian governmental entities a viable basis for economic survival.⁸ Consequently, since the United States encourages tribal development,⁹ the federal government should allow tribal entities to have more control over their own resources and the profits derived therefrom.

One such instance occurs when tribes try to obtain jurisdictional authority over non-Indians on the reservation. Over the past fifteen years, the Supreme Court has decided many cases concerning conflicting assertions of state and

5. See generally, e.g., Ward Churchill & Winona LaDuke, *Native North America: The Political Economy of Radioactive Colonialism*, in THE STATE OF NATIVE AMERICA, *supra* note 1, at 241 (discussing the United States' land and resources policies with regard to Native Americans).

6. See generally, e.g., *id.* at 241-66.

7. Title to American Indian lands is actually owned by the United States. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 603 (1823). The land is held in trust for the tribes. See, e.g., GILBERT L. HALL, *THE FEDERAL INDIAN-TRUST RELATIONSHIP* 1-3 (2nd ed. 1981).

Congress assumed authority over American Indian relations under the Act of 1871. Act of Mar. 3, 1871, 25 U.S.C. § 71 (1994). Congress, in the 1938 Mineral Leasing Act, determined that American Indians should receive "the greatest return from their property" and that the Bureau of Indian Affairs should insure such. S. REP. NO. 75-985, at 2 (1937); H.R. REP. NO. 75-1872, at 2 (1938). At least one scholar has argued that American Indians should have the right to autonomy in any matters relating to internal self-government including sole control and management over their resources. See Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 UTAH L. REV. 1105, 1109-10 (1995).

8. See generally, e.g., Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541, 544-45 (1994) (arguing that tribal control over mineral resources is critical from economic, environmental, and regulatory perspectives and in some circumstances may represent the best hope for economic development on a reservation).

9. Since Congress passed the Wheeler-Howard Act of 1934, the federal government has encouraged tribal self-government and tribal self-sufficiency. Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1994)). This Act, however, sustained much criticism between 1940-1962. During this period congressional hearings were held to facilitate tribal termination. Nevertheless, the 1934 Act survived and regained its full force after 1962. Indeed, President's Johnson and Nixon administrations helped pass many bills designed to strengthen tribal governments and tribal sovereignty. See, e.g., Rebecca L. Robbins, *Self-Determination and Subordination - The Past, Present, and Future of American Indian Governance*, in THE STATE OF NATIVE AMERICA, *supra* note 1, at 87 (discussing the United States recent desire to facilitate tribal self-government).

tribal jurisdiction over various activities of non-Indians within reservations, including hunting and fishing,¹⁰ property development,¹¹ taxation,¹² and mineral extraction.¹³

This comment examines the conflicts that arise when the states and tribal governments seek to tax non-Indian lessees. In recent years, the tribes and states have competed over the right to tax energy development and extraction.¹⁴ Indeed, these conflicts were inevitable considering the relative abundance of energy-producing natural resources located on reservations.¹⁵ These conflicts eventually led the Supreme Court to declare, in *Cotton Petroleum v. New Mexico*, that the tribes and states have concurrent taxation jurisdiction over non-Indian lessees as long as the state does not substantially burden the tribe or does not intrude too greatly into tribal and/or federal affairs.¹⁶

But should the tribes and the states *always* have concurrent taxation jurisdiction over non-Indian lessees under such a scenario? Could a situation arise that, if examined thoroughly, might lead a court to determine that concurrent tax jurisdiction should be disallowed? This comment argues that such a situation exists.¹⁷ Indeed, in *Texaco, Exxon, & Union Oil v. San Juan County*,¹⁸ the Utah Supreme Court, following *Cotton Petroleum Corp. v. New Mexico*, held that Utah could tax non-Indian lessees on the Aneth extension. In *Cotton Petroleum*, the non-Indian lessee was held to be subject to both a 6% tribal severance tax and an 8% state severance tax.¹⁹ Likewise, in

10. See, e.g., *Montana v. United States*, 450 U.S. 544, 566 (1981) (allowing the state to regulate non-Indian hunting and fishing activities on non-Indian fee land within a reservation).

11. See, e.g., *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 412-13 (1989) (allowing a county to zone property within a reservation only if the zoning regulations do not threaten the tribe's political integrity).

12. See, e.g., *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 845-46 (1982) (forbidding a state from taxing a non-Indian contractor who was constructing a tribal school).

13. See, e.g., *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 186-87 (1989) (allowing a state to tax non-Indian lessees that produced oil on an Indian reservation).

14. *Id.*

15. Royster, *supra* note 8, at 542-43. Royster noted that Indian tribes, collectively, are the third largest owners of mineral resources in the nation. *Id.* Moreover, Indian lands are estimated to contain 3% of the nation's known oil and gas reserves, thirty percent of the coal west of the Mississippi, and up to a third of this nation's uranium, as well as many other minerals. *Id.* The market value of these minerals is estimated to exceed in excess of \$1 billion. *Id.*

16. *Cotton Petroleum*, 490 U.S. at 186-87.

17. Several articles have been written detailing the scope of concurrent taxation jurisdiction over non-Indian lessees. The best of these articles is Royster, *supra* note 8. Another good article on the subject details the scope of the *Cotton Petroleum* decision. Charley Carpenter, Note, *Preempting Indian Preemption: Cotton Petroleum Corp. v. New Mexico*, 39 CATH. U. L. REV. 639 (1990).

18. 869 P.2d 942 (Utah 1994).

19. *Cotton Petroleum*, 490 U.S. at 168.

Texaco, Exxon, & Union Oil, the non-Indian lessees were held to be subject to a Navajo and state severance tax.²⁰

However, unlike *Cotton Petroleum*, Congress additionally provided, pursuant to a 1933 Act (adding the Aneth Extension to Navajo lands), for the State of Utah to collect 37-1/2% of the net royalties from production on the Aneth Extension²¹ and mandated that Utah use these proceeds to benefit any Navajo Indians residing therein.²² Moreover, the Act was silent as to non-Indian lessees being taxed by the state and local government.²³ Consequently, this comment will argue that the Utah Supreme Court should not have applied the *Cotton Petroleum* doctrine to non-Indian oil and gas lessees since applying the doctrine would intrude too greatly into federal and tribal affairs.

Part II of this comment outlines the concepts of Native American sovereignty. Part III traces mineral rights developments in Indian country. Part IV discusses the Utah Supreme Court's holding in *Texaco, Exxon, & Union Oil v. San Juan County School District*. Part V considers the history surrounding the 1933 Act and the addition of the Aneth Extension. Part VI advocates that the Utah Supreme Court should not have allowed the Navajo tribe and the state to share concurrent taxation jurisdiction over non-Indians lessees. Part VII concludes that the aforementioned case presents a situation where the Utah Supreme Court should have disallowed the state's taxation jurisdiction over non-Indian lessees.

II. The Federal Government, the States, and the Tribes

A. Tribal Sovereignty

Before European discovery, the American Indians were independent sovereign nations.²⁴ Each individual tribe had developed extensive political,

20. *Texaco, Exxon, & Union Oil*, 869 P.2d at 945.

21. *Id.* at 943. The 1933 Act added 552,000 acres of land to the Navajo Reservation — 500,000 acres in the Paiute Strip and 52,000 acres along the Utah-Colorado border known as the Aneth Extension. *Id.* at 944.

22. The 1933 Act specifically provides:

Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37 1/2 per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the state of Utah; Provided, That said 37 1/2 per centum of said royalties shall be expended by the state of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.

Act of Mar. 1, 1933, ch. 160, 47 Stat. 1418, 1418-19. In 1968, Congress amended this language to provide the State use the royalty proceeds "for the health, education, and general welfare of the Navajo Indians residing in San Juan County." Act of May 17, 1968, Pub. L. No. 90-306, 82 Stat. 121, 121.

23. *Texaco, Exxon, & Union Oil*, 869 P.2d at 943.

24. See, e.g., KIRKE KICKINGBIRD ET AL., INDIAN SOVEREIGNTY 5-7 (3rd ed. 1979).

cultural, and legal institutions.²⁵ However, in an early decision penned by Supreme Court Justice John Marshall, the Supreme Court ruled that the tribes' power to maintain complete sovereignty was diminished due to the doctrine of discovery.²⁶ As a result, the Court held that the tribes, although rightful occupants of the land, were denied the right to sell the land because the doctrine of discovery gave the discovering nation exclusive title to the land.²⁷

In a later decision written by Chief Justice John Marshall, the Supreme Court determined that Indian tribes could not be considered foreign nations under the United States' Constitution.²⁸ Subsequently, the Supreme Court determined that the United States Constitution granted the federal government sole control over regulating relations with Indian tribes.²⁹ This holding, in effect, guaranteed the federal government exclusive control over Indian tribes' political and legal status.³⁰ Additionally, the Supreme Court defined this exclusive relationship between the tribes and the federal government as one that "resemble[d] that of a ward to [its] guardian."³¹

During the United States' early years, the executive branch of government controlled tribal-federal relations through the treaty-making process.³² In an 1871 Appropriations Act, Congress forbid the executive branch from making treaties with the tribes.³³ Hence, any federal policies regarding Indian affairs

25. *Id.*

26. Johnson v. McIntosh, 21 U.S. (Wheat.) 543, 574 (1823).

27. *Id.* at 254. See generally Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947) (discussing thoroughly the doctrine of discovery and Indian land titles).

28. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 11 (1831). In *Cherokee Nation*, the Supreme Court held that it did not possess original jurisdiction over disputes between a state and a tribe. *Id.* The tribe had claimed Article III, Section 2 of the United States Constitution provided the Supreme Court original jurisdiction. *Id.* Article III, Section 2 grants federal courts jurisdiction to hear disputes "between a State . . . and a foreign States, Citizens or Subjects" and grants the United States Supreme Court the right to hear cases in which a State is a party. U.S. CONST. art. III, § 2, cls. 1, 2.

29. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-61 (1831). The United States Constitution only refers to American Indian tribes twice. First, the Constitution, in the Commerce Clause, grants the federal government the right to regulate trade with Indian tribes. Second, the Constitution, in Article 1, Section 2, stated that non-taxed Indians would not be counted in congressional representation districts. U.S. CONST. art. I, § 2, cl. 3.

30. See, e.g., Richard A. Monette, *A New Federalism For Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism And Republican Democracy*, 25 U. TOL. L. REV. 617 (1994); Nell Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984); see also William E. Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978) (providing a very good analysis of Chief Justice Marshall's American Indian jurisprudential holdings).

31. See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

32. See, e.g., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 126-27 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN, HANDBOOK].

33. Act of Mar. 3, 1871, 25 U.S.C. § 71 (1994). The portion of the Bill relating to Indian tribes stated that "no Indian nation or tribe within the territory of the United States shall be

would have to be authorized either by acts of Congress or Executive Orders.³⁴ Moreover, by forbidding the President's treaty-making power, this provision eliminated any necessary elements of tribal consent.³⁵ Consequently, by effectuating congressional acts as a way of guiding federal Indian policy, it became necessary to determine the intent of any acts passed by Congress.³⁶

Congress, after giving itself substantial power over Indian affairs, began to effectuate policy changes with regard to the Indian tribes.³⁷ At first, Congress initiated a period of forced assimilation through the implementation of the General Allotment Act.³⁸ The policy of allotment was designed to divide up the large communally held tribal land estates in favor of individual ownership.³⁹ The idea behind this policy was to encourage individual agricultural pursuits while destroying the tribes' communal village existence.⁴⁰ Indeed, after assimilation had occurred, the Allotment Act even considered whether Indians should be brought under state jurisdiction.⁴¹

The movement to assimilate the American Indians into the mainstream culture lasted for over fifty years.⁴² Fortunately, Congress reversed its prior thought when it passed the Indian Reorganization Act of 1934.⁴³ Instead of focusing on integrating individual Indians into society, the Indian Reorganization Act sought to integrate the tribe, as a unit, into society.⁴⁴ In so doing, Congress provided protection for the tribes' fundamental rights of political liberty and local self-government.⁴⁵ Moreover, Congress passed additional laws,⁴⁶ including the Indian Mineral Leasing Act of 1938,⁴⁷ which

acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." *Id.* The Act was the result of many years of debate between the House of Representatives and the Senate as to who had control over Indian affairs. *See, e.g., COHEN, HANDBOOK, supra* note 32, at 127-28.

34. *Id.* at 127.

35. *Id.*

36. *Id.* at 127-28.

37. *See, e.g.,* HENRY EUGENE FRITZ, *THE MOVEMENT FOR INDIAN ASSIMILATION, 1860-1890* (1963); FREDERICK HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920* (1984).

38. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1994)).

39. *See, e.g.,* Judith V. Royster, *Article: The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1105 (1995) (detailing allotment policies thoroughly).

40. *Id.*

41. 25 U.S.C. § 349 (1994).

42. For an in-depth discussion of the allotment era, see Royster, *supra* note 39, at 7-18.

43. Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1994)).

44. COHEN, *HANDBOOK, supra* note 32, at 147.

45. Carpenter, *supra* note 17, at 647. Carpenter's note cited to S. REP. NO. 73-1080, at Sess. 3-4 (1934) (letter from President Franklin Roosevelt).

46. *Id.* at 648. Carpenter's note cited to the Act of Sept. 1, 1937, 25 U.S.C. §§ 500-500n (1994) (providing for the federal acquisition, organization, and management of the reindeer

helped facilitate economic self-sufficiency for tribal governments.⁴⁸ The Indian Reorganization Act, although never disavowed, sustained heavy criticism over the next twenty years.⁴⁹ Nevertheless, this Act was reaffirmed and strengthened under the Nixon Administration.⁵⁰

B. The Preemption Doctrine

Unlike the frequent changes the tribal sovereignty doctrine has endured, the federal preemption doctrine, granting Congress plenary power over the tribes, is still the controlling principle of Indian Law.⁵¹ Indeed, without affirmative authorization, the state cannot regulate the tribes.⁵² Today, however, the federal preemption doctrine is best expressed in terms of jurisdiction.⁵³

industry); Act of Aug. 27, 1935, Pub. L. No. 74-355, 49 Stat. 891 (codified as amended at 25 U.S.C. §§ 305a-305c (1994) (providing for the federal promotion of the Indian arts and crafts industry).

47. Act of May 11, 1938, Pub. L. No. 75-506, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g (1994)).

48. COHEN, HANDBOOK, *supra* note 32, at 152.

49. See generally Charles F. Wilkinson & Eric R. Briggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977) (discussing the termination era and the various statutes enacted by Congress subjecting various tribes to state jurisdiction).

50. In 1968 President Nixon stated that he wanted to strengthen tribal sovereignty, transfer programs from the federal government to the tribal government, and secure Indian land bases. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 363, 91st Cong., 2d Sess. (1968). Indeed, many acts were passed within several years of this statement giving tribal governments much more power. See, e.g., Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. § 450a and elsewhere in scattered sections of 25 U.S.C., 42 U.S.C., 50 U.S.C., and 50 U.S.C. app.) (providing for the strengthening of tribal control over federally funded programs for Indians including programs for educational assistance to local school districts) and the Indian Child and Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. § 1901 (1994)) (providing for maximum tribal jurisdiction and to reduce the exercise of state jurisdiction in adoption or custody proceedings where the child is a member or could be a member in an Indian tribe).

51. The first significant case defining the relationship between the tribes, the federal government, and the states was *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). *Worcester* held that all power to regulate the tribes resided with the federal government. *Id.* at 561. Moreover, *Worcester* stated that without federal authorization the states could not act. *Id.* Additionally, all powers not expressly taken from the tribes, still resided in the tribes. *Id.*

Almost a century and a half later, the Supreme Court, in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1979), reaffirmed *Worcester* holding that Congress has a broad power to regulate tribal affairs under the Indian Commerce Clause. *Id.* at 142-43. Moreover, the *Bracker* Court stated that state regulatory authority over the tribes may be thwarted in two ways. First, state law may be preempted by federal law. *Id.* at 143. Second, state law may not infringe on tribal sovereignty. *Id.*

52. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 168 (1973). The *McClanahan* Court stated, "Indian nations were 'distinct political communities,' having territorial boundaries within which their authority is exclusive and having a right to all lands within those boundaries." *Id.* at 169 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832)).

53. See *Williams v. Lee*, 358 U.S. 214 (1959). *Williams* was the first modern case to discuss

Recent Supreme Court decisions have indicated that the determinative issue under preemption analysis is whether the state is trying to regulate Indian or non-Indian activities.⁵⁴ Indeed, if the regulated activity concerns non-Indian activities on Indian land, the question asked is whether state jurisdiction would interfere with the tribe's right of self government or an express act of Congress.⁵⁵ However, if the activity being regulated is solely an 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.⁵⁶ Hence, due to the tribes' unique relationship to the federal government as self-governing bodies and benefactors of the trust created by the guardian-ward relationship,⁵⁷ the states have no jurisdiction over tribes unless expressly granted that right by Congress or by treaty.

III. Mineral Development in Indian Country

A. Mineral Leasing in Indian Country

Mineral Leasing in Indian country was first authorized under a statute enacted in 1891.⁵⁸ Written four years after the Allotment Act, the 1891 Mineral Leasing Act resembled the reasoning of the era.⁵⁹ The oil and gas

the federal preemption doctrine within jurisdictional terms.

54. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 173 (1973).

55. *Williams*, 358 U.S. at 219. In *Williams*, two Navajo Indians were sued in a state court over their failure to pay debts incurred at a store owned by a non-Indian. *Id.* at 216. The *Williams* Court held that the state had no jurisdiction because state jurisdiction would interfere with the tribe's right of self-government. *Id.* at 219.

Since *Williams*, the doctrine of preemption has been used, for example, to oust state tax jurisdiction over non-Indians doing business within Indian country, if there was a federal statute or treaty giving the tribe exclusive tax jurisdiction over the non-Indian activity or if the state interfered to an impermissible extent with the ability of the tribe to govern itself. See *Central Mach. Co. v. Arizona Tax Comm'n*, 482 U.S. 160, 169 (1980) (federal statute); *Ramah Navajo Sch. Bd. v. New Mexico*, 458 U.S. 832, 848 (1982) (federal statute); *Crow Tribe of Indians v. New Mexico*, 484 U.S. 997, 1013 (1988) (impermissible state interference).

56. *McClanahan*, 411 U.S. at 173. In *McClanahan*, the Court held that the State of Arizona could not impose their state income tax on a member Navajo Indian who derived his income from reservation sources. *Id.*

57. For a very good article detailing the trust relationship between the tribes and the states, see Judith V. Royster, *Proceedings: Papers Presented and Commentary: Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327 (1995).

58. 25 U.S.C. § 397 (1994).

59. The 1891 Act permitted 10-year mineral leases on Indian lands set aside by treaty or agreement. *Id.* The leases required the consent of the tribes as well as the approval of the Secretary of Interior. *Id.* Moreover, tribes were prohibited from leasing land that was needed for agriculture or individual allotment. *Id.* Finally, Congress believed that non-Indian development of mineral resources was necessary because it would constitute an efficient and wise use of the land. Hoxie, *supra* note 37. For more on the allotment era, see *supra* notes 38-42 and accompanying text.

section of the 1891 Mineral Leasing Act was amended in 1924 and 1927 respectively.⁶⁰ The 1924 amendment⁶¹ applied to tribal lands within treaty reservations, and the 1927 amendment⁶² applied to tribal lands created by executive order.⁶³ Taken collectively, these acts specifically authorized state taxation of oil and gas production but also regulated all mineral extraction.⁶⁴ However, within ten years of the 1927 amendment, a major reformation occurred in mineral leasing law.⁶⁵

Not surprisingly, this reformation coincided with the waning era of assimilation and the rising era of tribal self-government.⁶⁶ This reformation did not destroy all prior mineral leasing law. Indeed, several areas of mineral leasing law have remained constant throughout these eras. First, under mineral leasing law guidelines, tribal governments have generally been restricted to the role of the lessor, leaving tribal governments little control over most leases.⁶⁷ Second, tribal mineral land, like tribal land, is held in trust by the federal government.⁶⁸ Finally, tribal mineral land may not be encumbered without the consent of Congress.⁶⁹

B. The Indian Mineral Leasing Act of 1938

The Indian Mineral Leasing Act of 1938 was passed by Congress to promote tribal economic and political self-sufficiency.⁷⁰ In doing so, the 1938 Act developed consistent laws to govern mineral leasing, promoted economic development by ensuring maximum profits on minerals, and encouraged using profits to achieve tribal economic and political self-

60. Other portions of the 1891 Mineral Leasing Act were amended over the years. For example, in 1919 Congress amended the 1891 Act to include mining gold, silver, copper, and other valuable minerals. 25 U.S.C. § 399 (1994). This Act also eliminated tribal consent to leasing. *Id.*

61. *Id.* § 398.

62. *Id.* §§ 398a-398e.

63. The two amendments taken collectively authorized the Secretary of Interior to lease oil and gas lands, with the consent of the tribes, for up to 10 years (or as long as royalties are being paid) following competitive bidding. *Id.* §§ 398-398a.

64. *Id.* § 398. Before this express congressional authorization, states were forbidden from taxing non-Indian lessees. *See, e.g., Gillespie v. Oklahoma*, 257 U.S. 501 (1922) (invalidating a tax on a non-Indian oil and gas lessee). The 1924 Act specifically authorized any assessed state taxes that fell upon non-Indian oil and gas lessees to be specifically taken from the royalties. 25 U.S.C. § 398c (1994). The 1927 Act specifically authorized states to tax bonuses, rents, and royalties. *Id.*

65. *See infra* Part III.B.

66. For more on the tribal self-government era, *see supra* notes 42-50 and accompanying text.

67. Royster, *supra* note 8, at 552.

68. *Id.*

69. *Id.*

70. S. REP. NO. 75-985, at 2-3 (1937); H.R. REP. NO. 75-1872, at 1-3 (1938).

sufficiency.⁷¹ The overall effect was to facilitate the tribe's role in mineral development.⁷²

One of the purposes of the 1938 Act was to ensure consistency throughout Indian mineral law.⁷³ Indeed, to achieve this, the act required a single set of procedures to govern Indian mineral law transactions.⁷⁴ However, the 1938 Act did not disallow several inconsistent areas of Indian mineral law.⁷⁵ First, the 1938 Act did not repeal any earlier mineral law acts, unless those acts contained express provisions inconsistent with the 1938 Act.⁷⁶ Second, the 1938 Act did not extend its scope to leases made on allotted lands.⁷⁷ Finally, the 1938 Act excluded certain tribes from coverage.⁷⁸

Another purpose of the 1938 Act was to provide for tribal political and economic self-government.⁷⁹ The 1938 Act granted tribes the right to consent to any mineral leases entered into on tribal lands.⁸⁰ Any lease entered into by the tribe, however, still had to be approved by the Secretary of Interior.⁸¹ Moreover, the Secretary of Interior was given the power to revoke a lease at any time if the lessee had violated any term or condition in the agreement or if a lease had been entered into in error.⁸² Such power was granted to the Secretary of Interior because the federal government has continually analogized that the tribes relationship with the federal government is like that of wards to a guardian.⁸³

The 1938 Act, in connection with the 1934 Indian Reorganization Act,⁸⁴ sought to provide the tribes with a means of economical survival. Accordingly, when Congress passed the 1938 Indian Mineral Leasing Act, Congress wanted to ensure that the tribes would retain "the greatest return

71. 25 U.S.C. § 396 (1994).

72. Royster, *supra* note 8, at 552.

73. *Id.* at 559.

74. *Id.* All leases required approval and consent of the Secretary of Interior, could not exceed ten years (or as long as royalties were being derived therefrom), and would only be granted after competitive bidding. 25 U.S.C. § 396a (1994).

75. See generally Royster, *supra* note 8, at 558-59.

76. *Id.* (citing to *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 764 (1985)).

77. *Id.* (citing 25 U.S.C. § 396a (1994)).

78. *Id.* (citing to 25 U.S.C. § 396f (1994)). Provision 396f excluded the Papago, Crow, and Osage Reservations, the ceded lands of the Shoshone [Wind River] Reservation, and the coal and asphalt lands of the Oklahoma Choctaw and Chickasaw. Twenty years later, Congress allowed the Papago, Shoshone and Crow lands to be included within the scope of the 1938 Act. Act of May 27, 1958, ch. 106, § 2, 69 Stat. 67, 67, 67-68.

79. See generally Royster, *supra* note 8, at 560-71.

80. 25 U.S.C. § 396a (1994).

81. *Id.*

82. Royster, *supra* note 8, at 564 (citing 25 C.F.R. § 211.27(a) (1995)).

83. Briefly, the ward-guardian distinction was first made in *Cherokee Nation v. Georgia*. See *supra* note 31 and accompanying text.

84. See *supra* notes 42-50 and accompanying text.

from their property."⁸⁵ Indeed, the Act required the Interior Department, acting in its trusteeship role, to establish a system of rents, bonuses, and royalties to guarantee income.⁸⁶ Hence, the 1938 Act would provide tribal governmental entities with the needed funds to facilitate economic strength, thereby facilitating political strength and power.⁸⁷

C. Preemption Analysis and Mineral Leasing

During the first quarter of this century, the United States Supreme Court, under the governmental tax immunity doctrine, invalidated any state taxes imposed on non-Indian lessees.⁸⁸ However, Congress authorized taxation of non-Indian oil and gas lessees in the 1924 and 1927 Acts.⁸⁹ Several years later, the Supreme Court invalidated the governmental tax immunity doctrine.⁹⁰ Instead, the Supreme Court held that states were allowed to impose nondiscriminatory taxes on non-Indian lands unless Congress impliedly or expressly prohibited such taxation.⁹¹

The 1938 Indian Mineral Leasing Act did not expressly authorize taxation of lessees on Indian lands. Nevertheless, states continued to tax mineral lessees.⁹² Finally, after forty years of taxation, the Interior Department in 1977 ruled that states were not allowed to tax mineral leases signed pursuant to the 1938 Act.⁹³ Subsequently, many tribes began to challenge the continued imposition of state taxes.

The first case to come before the Supreme Court was *Montana v. Blackfeet Tribe of Indians*.⁹⁴ The Blackfeet Tribe brought suit against the State of Montana for taxing oil and gas production under the 1938 Act.⁹⁵ The Supreme Court held that the taxation was invalid because it fell on Indian

85. S. REP. NO. 75-985, at 2 (1937); H.R. REP. NO. 75-1872, at 2 (1938).

86. Royster, *supra* note 8, at 565 (citing 25 U.S.C. § 396c (1994)). Royster also notes that these provisions failed badly due to royalty mismanagement, inadequate accounting practices, and mineral theft. *Id.* at 567.

87. Indeed, without economic power, political strength will be diluted. Hence, the United States' political and economic well-being has rested on its ability to control its landed interests. Likewise, whoever controls the land and the lands resources reap all the economic profits and such control translates into political strength as well.

88. See *supra* note 64. Briefly, the Supreme Court, in *Gillespie v. Oklahoma*, 257 U.S. 501 (1922), invalidated a tax that fell on a non-Indian oil and gas lessee. *Id.* at 504. The Supreme Court disallowed the tax due to the governmental tax immunity doctrine. *Id.* This doctrine reasoned that a tax on an entity doing business with the government was a tax on the government itself. *Id.*

89. See *supra* notes 60-65 and accompanying text.

90. See *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 386-87 (1938).

91. *Id.*

92. Royster, *supra* note 8, at 572.

93. *Id.*

94. 471 U.S. 759 (1985).

95. *Id.* at 761.

lessees.⁹⁶ Moreover, the Court noted that nothing in the 1938 Act authorized taxation of Indian lessees.⁹⁷ Indeed, the Court argued that a contrary holding would contradict the express purpose of the 1938 Act.⁹⁸

The *Blackfeet Tribe* Court, however, failed to discuss whether state taxation imposed on non-Indian oil and gas lessees would violate the 1938 Act. In *Crow Tribe of Indians v. Montana*,⁹⁹ the United States Supreme Court affirmed, without opinion, a Ninth Circuit decision considering that issue. The Ninth Circuit found that the State of Montana had placed a 33% on non-Indian mineral lessees.¹⁰⁰ The Ninth Circuit held that state taxes on non-Indian mineral lessees would be preempted if the tribe could prove that the taxes interfered with the purposes of the 1938 Act.¹⁰¹ Accordingly, when the Ninth Circuit discovered the negative impact this tax had on mineral development, the Court struck down the state tax.¹⁰²

The very next year the Supreme Court revisited the issue in *Cotton Petroleum v. New Mexico*.¹⁰³ Pursuant to the 1938 Act, Cotton Petroleum operated sixty-five oil wells on the Jicarilla reservation land.¹⁰⁴ Both the Jicarilla Apache Tribe and the State of New Mexico collected severance taxes and rental fees.¹⁰⁵ Moreover, New Mexico collected five additional taxes equaling approximately 8% of the total production value.¹⁰⁶

The Supreme Court, per Justice Stevens, determined that the tribe and the state had concurrent tax jurisdiction over a non-Indian lessee.¹⁰⁷ In so determining, the Court first argued that the 1938 Act was not designed to remove all barriers to profit maximization.¹⁰⁸ Rather, the 1938 Act was only designed to provide a source of revenue for the tribes.¹⁰⁹ According to the Court, state taxation on non-Indian lessees could only be invalidated if the

96. *Id.* at 768.

97. *Id.* at 766.

98. *Id.* at 767.

99. 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 484 U.S. 997 (1988) (*Crow II*).

100. *Id.* at 897.

101. *Id.* at 898.

102. *Id.* at 903.

103. 490 U.S. 163 (1989).

104. *Id.* at 168.

105. *Id.* at 167-69.

106. *Id.*

107. *Id.* at 186-87. Many articles have fiercely criticized this opinion. See, e.g., Carpenter, *supra* note 17; Kristina Bogardus, Note, *Court Picks New Test in Cotton Petroleum*, 30 NAT. RESOURCES J. 919 (1990); Katherine B. Crawford, Note, *State Authority to Tax Non-Indian Oil and Gas from Indian Reservations: Cotton Petroleum Corp. v. New Mexico*, 2 UTAH L. REV. 495 (1989).

108. *Cotton Petroleum*, 490 U.S. at 178-79.

109. *Id.*

taxation placed too great of a burden on tribes or intruded too much into tribal or federal affairs.¹¹⁰

Nevertheless, the Court ruled that none of these factors existed under New Mexico's taxation scheme.¹¹¹ First, the Court found that the federal government did not exclusively regulate Indian mineral leasing.¹¹² Indeed, the State of New Mexico regulated the spacing and integrity of the wells located on the reservation.¹¹³ Second, the Court stated that the 8% tax did not have a substantially negative impact on the development of oil and gas resources or tribal revenue derived therefrom.¹¹⁴ Thus, the primary burden was slight and the brunt of the taxes fell on the non-Indian lessee.¹¹⁵ Consequently, the Supreme Court allowed the tax to stand.

IV. Texaco, Exxon, and Union Oil Co. v. San Juan County School District

A. The Facts and Legal History of the Case

Under a 1933 Act, Congress added 552,000 acres of land to the Navajo Indian Reservation.¹¹⁶ This land, located in Utah, was denoted in the Act as the Aneth Extension.¹¹⁷ However, of the 552,000 acres, only 52,000 acres actually bore the Aneth Extension name.¹¹⁸ The other 500,000 acres were located in the Paiute Strip.¹¹⁹

The 1933 Act expressly granted "37 1/2% of the net royalties from any oil or gas leases on the Aneth Extension . . . to the state of Utah for the benefit of the Indians residing in the Aneth Extension."¹²⁰ Starting in 1953, the Navajo Nation began leasing portions of the Aneth Extension to oil companies pursuant to the 1938 Indian Mineral Leasing Act.¹²¹ The oil and gas companies paid the State of Utah the aforementioned royalties from 1953

110. *Id.* at 185-86.

111. *Id.*

112. *Id.*; see also Royster, *supra* note 8, at 577. Royster, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148 (1980), stated that prior analysis had also focused on the pervasiveness or comprehensiveness of a federal scheme, not the exclusivity of a federal scheme. Moreover, Royster noted that the Supreme Court never specified the state's authority to regulate such matters. Royster, *supra* note 8, at 577.

113. *Cotton Petroleum*, 490 U.S. at 185-86.

114. *Id.* at 187.

115. *Id.*

116. *Texaco, Exxon, & Union Oil v. San Juan County*, 869 P.2d 942 (Utah 1994); see also Act of Feb. 28, 1891, ch. 383, 26 Stat. 795 (codified at 25 U.S.C. § 397 (1994)) (the 1891 Act).

117. *Texaco, Exxon, & Union Oil*, 869 P.2d at 943.

118. *Id.* at 944. The Aneth Extension lies along the Utah-Colorado border. *Id.*

119. *Id.*

120. *Id.* at 943.

121. *Id.*

through 1974 and any additional state taxes imposed by Utah.¹²² In 1978, the Navajo tribe began taxing all oil and gas lessees, including those in the Aneth Extension.¹²³

The 1933 Act, however, did not specify whether revenues derived by non-Indian lessees would be taxable by the state government.¹²⁴ Consequently, the oil and gas companies, after paying their state taxes under protest, filed suit in the Seventh District Court opposing the imposition of state production taxes on non-Indian lessees on Indian lands.¹²⁵ The oil and gas companies alleged that Congress had provided royalties be paid instead of taxation.¹²⁶ Accordingly, the companies argued that such reasoning was proved by Congress' failure to expressly provide for state taxation of non-Indian lessees on Indian land.¹²⁷

Meanwhile, the United States Supreme Court decided *Cotton Petroleum Corp. v. New Mexico*, which allowed New Mexico state to tax non-Indian lessees' oil revenues under the 1938 Act.¹²⁸ As a result, some of the oil and gas companies voluntarily dismissed their claims against the State of Utah.¹²⁹ However Texaco, Exxon, and Union Oil, maintained that *Cotton Petroleum* did not apply.¹³⁰

The district court held that *Cotton Petroleum* controlled since the 1933 Act did not prohibit state taxation on non-Indian oil and gas lessees.¹³¹ Therefore, the district court allowed the state and local entities to continue taxing oil and gas production within the Aneth Extension.¹³² Subsequently, Texaco, Exxon, and Union Oil appealed to the Utah Supreme Court.¹³³

B. The Utah Supreme Court's Holding

The Utah Supreme Court stated that the issue before the court was whether the 1933 Act, which was silent on the issue of taxation, prevented the state from taxing non-Indian lessees' revenues on the Aneth Extension.¹³⁴ To preempt Utah's state tax, the court established that the oil and gas companies would have to show a clear congressional intent to forbid "powers otherwise available to [the state]."¹³⁵

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. See *supra* notes 103-15 and accompanying text.

129. *Texaco, Exxon, & Union Oil*, 869 P.2d at 943.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 945.

Exxon, Texaco, and Union Oil argued that the 1933 Act's silence demonstrated an affirmative action to incorporate the then-governing 1922 *Gillespie* rule.¹³⁶ In *Gillespie*, the United States Supreme Court invalidated a state tax on non-Indian oil lessees on Indian land.¹³⁷ The United States Supreme Court did not specifically overrule *Gillespie* until 1938.¹³⁸

The Utah Supreme Court maintained, however, that the 1933 Act, which was silent on the issue of taxation, only authorized the addition of the Aneth Extension to the Navajo Reservation.¹³⁹ Moreover, the court recognized that *Gillespie* had been invalidated fifteen years before the Navajo nation had leased tribal land to the oil companies.¹⁴⁰ Accordingly, since the 1933 Act did not apply, the Utah Supreme Court held that the 1938 Act governed.¹⁴¹ Therefore, the court allowed the State of Utah to tax the interest in oil and gas leases on the Aneth Extension.¹⁴²

V. The Navajo Nation and the Aneth Strip

The Navajo Nation was established by executive treaty in 1868.¹⁴³ Under the original treaty, the Navajo Nation contained 3,414,528 acres.¹⁴⁴ This acreage, however, only comprised 10% of the land that the Navajos had

136. *Id.*

137. *Id.* at 944; see *supra* note 64. As a result of the *Gillespie* holding, Congress authorized taxation of non-Indian oil and gas lessees on Indian lands in 1924 and 1927 amendments to the 1891 Mineral Leasing Act. 25 U.S.C. § 398 (1994).

138. *Texaco, Exxon, & Union Oil*, 869 P.2d at 944.

139. *Id.* at 945.

140. *Id.*

141. *Id.*

142. *Id.*

143. See Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667. The people of the Navajo nation are distinct from other Indian groups because of their diverse ancestral heritage. See David M. Brugge, *Navajo Prehistory and History to 1850*, in 10 HANDBOOK OF NORTH AMERICAN INDIANS 493 (Alfonso Ortiz ed., 1983) [hereinafter HANDBOOK OF INDIANS]. The Navajo peoples ancestral roots developed from two distinct cultures. *Id.* The first ancestral root was comprised of an Apachean band of Indians that migrated into the area approximately 1000 years ago. *Id.* at 489. The second culture was comprised of an Anasazi-Puebloan band of Indians that had originally inhabited the area. *Id.* at 493. These two cultures fused around 1700 with the *Apaches de Nabajo* culture providing its linguistic and political customs and the *Puebloan* culture providing its theological customs. *Id.*

In the early Navajo society, political organizations were local in nature. See Gary Witherspoon, *Navajo Social Organization*, in 10 HANDBOOK OF INDIANS, *supra*, at 531. Indeed, until the early 1900s, local groups handled both internal and external matters. *Id.* In most groups, an organization called a residence group would be formed to manage internal matters while a local headmen would be engaged to supervise external matters (including the power to negotiate with other Navajo groups, Indian tribes, and non-Indians). *Id.*

144. See Robert A. Roessel, Jr., *Navajo History, 1850-1923*, in 10 HANDBOOK OF INDIANS, *supra* note 143, at 519.

originally inhabited.¹⁴⁵ Problems developed shortly thereafter as non-Navajos moved into areas traditionally inhabited by Navajos.¹⁴⁶ Hence, to quell tensions between the Navajos and non-Navajos, various congressional acts and executive orders provided for the expansion of the Navajos original land base.¹⁴⁷ As a result of these enactments, the reservation tripled in size over a sixty-year period.¹⁴⁸

One portion of land that was added to the Navajo reservation during this period was the Aneth Extension.¹⁴⁹ The Aneth Extension was a very small strip of land located in southeastern Utah.¹⁵⁰ Congress added the Extension to the Navajo reservation in a 1933 Act.¹⁵¹ However, the factual history behind the 1933 Act can be described as egregious at best.

Under the 1933 Act, Congress provided that if oil and gas was found on the Aneth Extension 37.5% of all royalties would go to the State of Utah for "payment of the tuition of Indian children in white schools, and/or in the building or maintenance of roads across the lands . . . for the benefit of Indians residing therein."¹⁵² However, the Utah congressional delegation was already aware of the oil and gas discoveries that had been made in this region.¹⁵³ Therefore, the delegation, after some coaxing, was able to implement legislation allowing the State of Utah to receive 37.5% of all oil and gas royalties.¹⁵⁴ Furthermore, Utah was granted the right to renounce

145. *Id.* at 520.

146. *Id.*

147. *Id.* Over a 60-year period, various portions of land were both added to and subtracted from the Navajo reservation. *Id.* For a thorough discussion of the various enactments and a visual map showing each enactment, see *id.* at 520.

148. *Id.*

149. *Id.*

150. *Id.* Indeed, only 52,000 acres of land comprised the Aneth Extension. Texaco, Exxon, & Union Oil v. San Juan County, 869 P.2d 942, 943 (Utah 1994).

151. RAYMOND FRIDAY LOCKE, *THE BOOK OF THE NAVAJO* 432 (5th ed. 1992). It should be noted that all the sources that this author has consulted, except one, have referred to the land granted under the 1933 Act as the Aneth Extension. However, Locke stated that this addition was called the Aneth Strip. *Id.* According to Locke, the Aneth Extension was granted to the tribe under a 1905 Act. *Id.* at 428. This grant of land, encompassing 56,953 acres due south of the Aneth Strip, was added to the reservation under the reign of Indian Commissioner Francis E. Leupp. *Id.*

152. *Id.* at 432. The 37.5% royalty provision in the 1933 Act was not an arbitrary percentage rate pulled out of thin air. Instead, this royalty provision was identical to the taxation rate levied by the 1927 amendment. Mary Shepardson, *Development of Navajo Tribal Government*, in 10 *HANDBOOK OF INDIANS*, *supra* note 143, at 626. Indeed, it led Shepardson to state that the 1927 Indian Oil Act "still governs the use of oil revenue from Navajo land in Utah." *Id.* For more on the 1927 Amendment, see *supra* notes 60-65 and accompanying text.

153. LOCKE, *supra* note 151, at 432. Unfortunately, all the cases discussing the 1933 Act have failed to mention this important factor. For example, in *United States v. Jim*, 409 U.S. 80 (1972), the Supreme Court asserted that oil and gas was discovered on the Aneth Extension after the passage of the Act. *Id.* at 81.

154. LOCKE, *supra* note 151, at 432.

reservation school tracts.¹⁵⁵ This, in effect, freed the State of Utah from the responsibility of providing schools for the Indians living on the Aneth Extension while still allowing the state to collect a percentage of Navajo oil and gas royalties for that purpose.¹⁵⁶

In 1968, Congress amended the 1938 Act and required the State of Utah to use the royalty proceeds to provide "for the health, education, and general welfare of the Navajo Indians residing in San Juan County."¹⁵⁷ Nevertheless, the funds collected under the royalty provision have never reached the peoples of the Aneth Extension.¹⁵⁸ For example, most of the native dwellers live either in ragtag governmental tract houses or traditional round earthen hogan dwellings.¹⁵⁹ Moreover, 60% of these inhabitants do not have running water or electricity.¹⁶⁰ Furthermore, almost 95% of these inhabitants have problems reading or writing.¹⁶¹ Not surprisingly, these findings have caused many to maintain that the inhabitants of the Aneth Extension are the most impoverished people not only in the State of Utah but in the entire Navajo Nation.¹⁶²

As a result of this abject poverty, some concerned citizens began to wonder where all of the royalty proceeds were going. Indeed, the State of Utah received \$61 million in royalty proceeds between 1960-1990.¹⁶³ However, a recent audit revealed that only \$9.5 million remained in the trust fund leaving the state accountable for the other \$51.5 million.¹⁶⁴ Obviously, those funds have not been spent on the residents of the Aneth Extension. Hence, the state confessed that it had recklessly squandered \$51.5 million.¹⁶⁵

155. *Id.* at 432-33. The state was given the right upon renouncement to select like tracts of equal acreage outside of the Aneth Extension. *Id.* at 433.

156. *Id.* at 433.

157. Act of May 17, 1968, Pub. L. No. 90-306, 82 Stat. 121.

158. The inhabitants of the Aneth Extension are not purely of Navajo decent. Instead, these inhabitants were a mixture of Navajo and Piute (as spelled in the opinion). *Jim*, 409 U.S. at 84. Hence, there is a distinct blood-line difference between the inhabitants of the Aneth Extension and the inhabitants of the Navajo Nation. *Id.*

159. Florence Williams, *Navajos Push For Political Clout*, CHRISTIAN SCI. MONITOR, Aug. 28, 1990, at 7 [hereinafter Williams, *Navajos Push for Clout*]; Nancy Lofholm, *Despite Prayers, a Navajo-Mormon Cultural Clash*, N.Y. TIMES, July 24, 1996, at A16.

160. Lofholm, *supra* note 159, at A16.

161. Williams, *Navajos Push for Clout*, *supra* note 159, at 7.

162. *Id.*

163. Florence Williams, *Utah Freezes Navajo Fund as Report Details Scandal; American Indians: An Audit Alleges State, as Trustee, Looked the Other Way as Oil Royalty Trust Account Was Plundered*, L.A. TIMES, Jan. 25, 1992, at A18 [hereinafter Williams, *Utah Freezes Navajo Trust Fund*]. Conversely, the Navajo Nation has received 62.5% of these royalties equaling approximately \$5.83 million dollars between 1960-1990. However, the Navajo Nation spent very little on the Aneth Extension people. Williams, *Navajos Push for Clout*, *supra* note 159, at 7. Overall, between 1960-1990, the Aneth Extension generated \$137.33 million.

164. Williams, *Utah Freezes Navajos Fund*, *supra* note 163, at A18.

165. *Id.* The royalties have been used for all types of non-Indian projects. For example,

The impoverished Aneth Extension residents will never see the \$51.5 million the State of Utah squandered, and it is questionable, noting prior history, if these people will ever see any of the royalty proceeds generated from this land.¹⁶⁶ Nevertheless, Utah officials must not believe that the initial 37.5% of the royalty proceeds is enough to adequately care for the Aneth Extension peoples. Indeed, the state finds it necessary to place an additional tax on oil and gas production. In the next section, this comment will argue that this additional tax should be invalidated because it contravenes the purposes of the 1933 and 1968 Acts.

VI. Why Cotton Petroleum Should Not Apply

The *Cotton Petroleum* decision has been greatly criticized by scholars.¹⁶⁷ Nevertheless, it remains the controlling doctrine in this area of Federal Indian law. Under *Cotton Petroleum*, the Supreme Court provided that taxes on non-Indian lessees could be invalidated if the tax substantially burdened the tribe or greatly encroached upon tribal and/or federal affairs.¹⁶⁸ Next, to determine whether the aforementioned factors occurred, the Court analyzed several areas including whether the tax interfered with a comprehensive federal regulatory scheme, whether the state regulated the taxed product,¹⁶⁹ and whether the tax

funds have been used to build airports, roads, schools, and a museum all in an anglo town many miles north of the reservation. Williams, *Navajos Push for Clout*, *supra* note 159, at 7. Recently, the State of Utah reenacted the Aneth Extension Trust Fund Statute in an attempt to protect against the possibility of royalty left. Navajo Revitalization Fund Act, UTAH CODE ANN. § 9-11-107 (Supp. 1996). This same statute, which was originally enacted in 1959, had been repealed one year earlier. *Id.*

166. It should be noted that the Aneth Extension residents, as beneficiaries of the Utah Navajo Trust Fund, have recently won a major legal battle. Indeed, in *Pelt et al. and The Navajo Nation v. State of Utah*, Nos. 95-4135, 95-4136, 1996 U.S. App. LEXIS 33970 (10th Cir. Dec. 31, 1996), the United States Court of Appeals held that the beneficiaries of the Utah Navajo Trust Fund had an implied cause of action for breach of common law fiduciary duty against the State of Utah. *Id.* at *28. The appellate court, after determining this, remanded the case for retrial. *Id.* at *2.

As a result of the appellate court's unanimous three-judge decision, the Utah Attorney General's Office has petitioned the entire 10th Circuit Court of Appeals for reconsideration. Christopher Smith, *Navajos Want State to Restore Embezzled Millions; Navajos Not Giving Up Fight For Millions*, SALT LAKE TRIB., Jan. 19, 1997, at C1. The beneficiaries are claiming that the State of Utah has squandered between \$52 million and \$100 million dollars. *Id.* However, these residents have yet to see any monetary benefits. Therefore, in light of previous history, success can not be measured by the number of court decisions ascertained. Instead, success can only be measured by action on said subjects.

167. See *supra* note 107.

168. *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 185 (1989).

169. *Id.* at 186-87. The Court noted that it would strike down a tax provision if it was enacted only to raise revenue or if it was used to supplement non-Indian tax rates off the reservation. *Id.* at 185-87. Moreover, the Court stated that any tribal regulation of the taxed activity should also be given some consideration in determining whether a state tax provision

negatively impacted tribal revenue and/or resource development.¹⁷⁰ The Court, after examining these factors, allowed the state to continue taxing the non-Indian lessees.¹⁷¹

The *Cotton Petroleum* Court upheld the state tax for several 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.¹⁷² Second, the brunt of the taxes fell on the non-Indian producers; therefore, the tax did not negatively impact the tribe.¹⁷³ Finally, the State of New Mexico used these taxes to provide services to the tribe.¹⁷⁴

The scope and breadth of the *Cotton Petroleum* decision has been narrowly interpreted by several federal appellate courts.¹⁷⁵ These courts have distinguished their cases from *Cotton Petroleum* on factual grounds.¹⁷⁶ In *Hoopa Valley Tribe v. Nevins*, the appellate court, after finding that the federal government had established a comprehensive regulatory scheme, invalidated a state tax on timber operations.¹⁷⁷ Moreover, in *Gila River Indian Community v. Waddell*, the appellate court invalidated a state tax even though the state provided some services in connection with the taxed good.¹⁷⁸ Finally, in *Cabazon Band of Mission Indians v. California*, the appellate court disallowed concurrent taxation even though the state had traditionally regulated the taxed activity.¹⁷⁹

In *Texaco, Exxon, and Union Oil*, the Utah Supreme Court, unlike the other lower federal courts, failed to determine whether Utah had violated any of the tax invalidation factors listed in *Cotton Petroleum*.¹⁸⁰ If the Utah court had utilized the *Cotton Petroleum* factors, the court would have found that Utah's tax policy clearly violated tribal sovereignty. First, the State of Utah

should be struck down. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Cabazon Band of Mission Indians v. California*, 37 F.3d 430 (9th Cir. 1992), *cert. denied*, 494 U.S. 1055 (1992); *Gila River Indian Community v. Waddell*, 967 F.2d 1404 (9th Cir. 1992); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989).

176. *See Waddell*, 967 F.2d at 1410-11; *Nevins*, 881 F.2d at 660.

177. *Nevins*, 881 F.2d at 660. The state admitted that there was no connection between the tax and any services it provided tribal members. *Id.* at 660.

178. *Waddell*, 967 F.2d at 1410-11.

179. *Cabazon Band of Mission Indians*, 37 F.3d at 435. In *Cabazon*, the state was regulating race-track betting. *Id.* at 432.

180. The Utah Supreme Court stated that after 1938 "states were allowed to impose nondiscriminatory taxes on non-Indian lessees on Indian lands unless Congress prohibited such taxation, either expressly or impliedly." *Texaco, Exxon, & Union Oil v. San Juan County*, 869 P.2d 942, 944 (Utah 1994). However, the Court did not consider whether Utah's tax was nondiscriminatory nor did it consider any of the other invalidation provisions discussed in *Cotton Petroleum*.

did not have an established regulatory scheme governing the oil wells on the Aneth Extension.¹⁸¹ Indeed, the State of Utah did not specifically regulate the spacing or the integrity of wells located on the Aneth Extension.¹⁸²

However, even if the state did regulate the wells, it should not be allowed to tax the oil and gas proceeds. Instead, to prevent the negative effects that result from concurrent tribal and state taxation, any expenses incurred by the state should be taken from royalty proceeds provided under the 1933 Act.¹⁸³ The 1933 Act, as amended in 1968, provides for funds to be used for the "health, education, and general welfare" of the Navajos.¹⁸⁴ Hence, paying the taxes under the 1968 Act's "general welfare" provision would leave the tribe and the state on the same footing when competing for non-Indian oil and gas lessees, thereby allowing the tribe to continue to receive more royalties in the long term.¹⁸⁵ As a result, the federal goal of promoting tribal self-government is also fulfilled because the tribe is receiving more funds.¹⁸⁶

Second, the State of Utah did not have to provide services to tribal members with these taxation proceeds. As aforementioned, Congress had already authorized the state to use 37.5% of the royalties on tribal members.¹⁸⁷ Indeed, over a thirty-year period, the state had received \$61 million in royalty proceeds.¹⁸⁸ Hence, since the state had already been allocated a substantial amount of monies, the state should not have to retax the tribe's resources.¹⁸⁹

181. The Utah Court did not list any reasons or uses for the tax. The state statute on oil and gas taxation authorizes the state to tax all oil and gas wells within the state. UTAH GEN. STAT. § 40-6-14 (1993 & Supp. 1996). It also allows a state board to impose regulations. *Id.* § 40-6-5, 40-6-14 (1993). Nevertheless, no impending statutory regulations seem to have been imposed on the Aneth Extension.

In 1960, the State of Utah had established 80-acre drilling and spacing units for the Greater Aneth Area. *Harkin Southwest Corp. v. Board of Oil, Gas And Mining, Dep't of Natural Resources, State of Utah*, 920 P.2d 1176, 1178 (Utah 1996). However, the *Harkin* opinion did not indicate whether this regulation included the Aneth Extension.

Moreover, the Navajo tribe, under the encouragement of the BIA, enacted a provision allowing the tribe to monitor and regulate any oil and gas wells located on their lands. NAVAJO NATION CODE tit. 18, § 1401-03 (Equity 1995). The BIA has encouraged such tribal regulations because the BIA hopes that tribal involvement will deter oil and gas royalty left. Federal Oil and Gas Management Act, 30 U.S.C. §§ 1701-1751 (1994). The Act specifically authorized the Secretary of the Interior to work with tribes on inspections. *Id.*

182. See *supra* note 181.

183. The negative effects dual taxation has on a non-Indian lessee is one of great concern. Indeed, if a non-Indian lessee is taxed once by the tribe and once by the state, the lessee is incurring a larger loss by drilling on Indian lands. Consequently, the lessee receives more profits if he does not drill on Indian land. This in effect reduces the amount of drilling on Indian land, and hence, the amount of profits derived therefrom.

184. See *supra* note 157 and accompanying text.

185. See *supra* note 181.

186. See *supra* notes 42-50 and accompanying text.

187. See *supra* notes 152, 157 and accompanying text.

188. See *supra* notes 164-66 and accompanying text.

189. The State of Utah has wasted \$51.5 million. See *supra* notes 163-65 and accompanying

Third, dual taxation by the Navajo tribe and the State of Utah does negatively impact tribal revenue. The dual taxation levels under both *Cotton Petroleum* and *Exxon, Texaco, & Union Oil* are minimal. However, in the later case, the federal government already provided for the state to receive 37.5% of the royalty proceeds.¹⁹⁰ Hence, the 1933 Act authorized a level of funding comparable to taxation. Therefore, any additional taxation measures should be invalidated because such high levels of taxation impacts tribal revenue negatively.

Since the *Exxon, Texaco, & Union Oil* case fails all three *Cotton Petroleum* factors, the ruling greatly encroaches upon tribal and federal affairs. Indeed, the Navajo Tribe is losing revenues due to this decision and therefore, is unable to fully achieve economic and political self-sufficiency. This result runs contrary to the goals of the 1938 Mineral Rights Act and the 1934 Indian Reorganization Act.¹⁹¹ The 1938 Act was passed to provide tribal governmental entities with the needed funds to facilitate economic strength, thereby facilitating political strength and power. Hence, when the Utah court allowed dual taxation it robbed the Navajo nation once again of a chance to gain political and economic power.

VII. Conclusion

This comment has maintained that the tribes and the states should not *always* have concurrent taxation jurisdiction over non-Indian oil and gas lessees. Indeed, after carefully examining *Texaco, Exxon, & Union Oil v. San Juan County*, a compelling argument can be made for disallowing the state to share concurrent tax jurisdiction with the tribe over non-Indian oil and gas lessees. Such a holding, however, would not explicitly violate the *Cotton Petroleum* doctrine. *Cotton Petroleum* specifically followed preemption analysis. Therefore, if a future court were to find that a state taxation scheme significantly affected the development of oil and gas production, then the non-Indian oil and gas lessees could be exempt from state taxation. Hence, after examining the egregious nature of the 1933 Act, *Cotton Petroleum* should not be followed because applying the doctrine would intrude too greatly into tribal and/or federal affairs.

The courts must protect the tribes from unlawful state intrusions into tribal affairs. Indeed, as President Theodore Roosevelt indicated, the United States is a nation that thrives on expansion.¹⁹² This cost the Indians their land base. It also cost the Indians the ability to fully control their resources. However,

text. Yet the state still has the audacity to retax oil and gas proceeds on tribal land. When is enough "enough"?

190. See *supra* note 152 (stating that the royalty percentage rate authorized under the 1933 Act and the oil and gas taxation rate in 1933 were both 37.5%).

191. See *supra* notes 70-87 and accompanying text.

192. See *supra* note 1 and accompanying text.

it should not cost the Indians the ability to reap the full benefit of their resources. Hence, the courts should not allow unwarranted expansion, like the State of Utah's dual taxation scheme, to impede the Indian's right to self-government.