

**STATE AND FEDERAL TAX POLICY: BUILDING NEW MARKETS IN INDIAN  
COUNTRY**

**Statement of Peter Ortego  
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Mr. Chairman and Committee members, thank you for the opportunity to testify in regards to state and federal taxation in Indian country and its effects on tribal economic development. My name is Peter Ortego and I am the General Counsel for the Ute Mountain Ute Tribe. I reside in Lewis, Colorado, about thirty miles North of Towaoc, Colorado, the governmental seat for the Tribe. My testimony today is limited to the facts and circumstances as they relate to the Ute Mountain Ute Tribe, as this is where my experience lies, but I believe there are sufficient similarities between tribes so that these comments could apply to numerous tribes.

The Ute Mountain Ute Reservation consists of over 500,000 acres located in Colorado, Utah, and New Mexico. The Tribe has just over 2000 members, most of whom reside on the Reservation either in Towaoc, Colorado, or White Mesa, Utah. No person resides within the New Mexico portion of the Reservation.

According to the United States Census for 2000, the average annual income of an adult living on the Reservation was \$8,159. By comparison, income for residents of San Juan County, New Mexico, where the New Mexico portion of the Reservation is located was \$14,282 and \$17,261 for residents of the State of New Mexico. Income for residents of Montezuma County, Colorado, where Towaoc is located, was \$17,003 and \$24,049 for residents of the State of Colorado.

The Tribe distributes \$2000 per year to each Tribal member (slightly more for elders). The distributions are made out of funds generated from oil and gas royalty and tax revenues. Additional financial benefits are paid to Tribal members under the general welfare doctrine. No gaming revenues are distributed to Tribal members on a per capita basis and all funds derived

from economic development activities are used for governmental purposes and to defray the costs of government services.

The Tribe has obtained funds from the settlement of water claims and uses these funds for economic development and resource enhancement. One fund is specifically restricted to economic development and the other is restricted to resource enhancement. The Tribe currently uses interest earned from the economic development fund for its economic development projects and has never spent any portion of the principal, to the best of my knowledge.

The Tribe is engaged in numerous economic activities. The Tribe has a casino and hotel, a construction company, a farm and ranch enterprise, a pottery store, a guided tour service, and two travel centers. The Tribe also earns significant revenue from oil and gas operations in both Colorado and New Mexico. The Tribe is venturing into renewable energy and has several commercial scale projects under review, including a closed loop pumpback storage project that is currently pursuing a FERC permit.

The Tribe is the largest employer in Montezuma County and owns several ranches in the state of Colorado. The Tribe asserts Indian preference in employment, provides free employment training to its members, and provides financial literacy education to employees and members.

The Tribe does not impose very many taxes; there is a severance tax and possessory interest tax imposed on oil and gas extraction, and there is a hotel tax that is charged to patrons of the hotel. The Tribe imposes fees for some services provided to its members, and charges non-members for access permits, rights-of-way, and leases over trust and non-trust properties.

The Tribe pays numerous state and federal taxes, as well. The Tribe pays state fuel, excise, cigarette, property, and employment taxes and federal excise and employment taxes. The Tribe also pays for unemployment insurance and workman's compensation insurance.

In fiscal year 2011, the Tribe's travel centers paid \$561,570 in federal fuel-related taxes and \$588,626 in state fuel-related taxes (Utah and Colorado). The Tribe's travel centers and casino paid \$67,895 in state cigarette taxes.

I believe one of the best ways to understand and appreciate the impact of state taxes on Tribal economic development is to review the lawsuit that the Tribe filed in federal court in 2009 against the Treasurer for the State of New Mexico alleging that the state has no authority to collect taxes and impose regulations on oil and gas activities that occur within the boundaries of the Reservation. The basis of the Tribe's claim is that the taxes impose a significant economic burden on the Tribe, and, in light of the fact that the Tribe and its members receive no direct services from the state of New Mexico on the Reservation, the state has no justification to impose the taxes.

The Tribe was successful in the District Court and received a judgment in its favor. (See *Ute Mountain Ute Tribe v. Homans*, 775 F.Supp.2d 1259 (D.N.M. 2009).) The District Court made specific findings that were uncontested by the state and concluded that the services provided by the state to the Tribe and its members are *de minimus* and that the imposition of the taxes creates an economic burden to the Tribe. The Court found that in 2007, the total revenue earned by the Tribe was \$16,052,092 with \$4,426,741 being distributed to Tribal members on a per capita basis generated from oil and gas taxes and royalties, primarily from the New Mexico portion of the Reservation. Notably, in the same year, according to the Court's estimates, the state received approximately more than \$1,300,000 in revenues from taxes imposed on on-Reservation oil and gas activities.

In 1992, the Ute Mountain Ute Tribal Council passed a resolution stating that if state taxes imposed on oil and gas activities within the Reservation were reduced or eliminated, then the Tribal taxes imposed on the same activities would be increased by the amount that the state taxes were reduced. In 2007, this would have resulted in an increase in Tribal oil and gas revenues of approximately \$1,300,000. This would mean that \$650 could be distributed per capita to each Tribal member, increasing the average income of Tribal members by 8% using 2000 Census income levels. The District Court found that if the state taxes were reduced or

eliminated, the Tribe could exercise one of several alternatives, including amending the 1992 resolution to impose a lesser tax or no tax at all, and the result would be that oil and gas production on the Reservation would be more attractive to potential operators than it is with the burden of the state taxes.

The state of New Mexico appealed the decision of the District Court to the Tenth Circuit Court of Appeals. Unfortunately for the Tribe, the Tenth Circuit did not agree with the findings of the District Court and reversed the ruling. (See *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177 (N.M. 2011).) The Tenth Circuit found that the District Court was wrong to find that the taxes created an economic burden to the Tribe because the Tribe did not subsume the cost of the taxes by reimbursing the operators for the tax. Also, the Tenth Circuit found that off-reservation services provided by the state – such as roads and processing facilities – were sufficient to justify the on-Reservation taxes, even though the state already imposes separate taxes on oil and gas operators for those off-reservation services. Finally, and the most problematic for the Tribe, is that, under the Tenth Circuit holdings, the only way for the Tribe to conduct oil and gas activities on its Reservation without the burden of state taxes being imposed on its non-Indian operators is for the Tribe to provide *all services* related to the production, regulation, and processing of oil and gas extracted from the Reservation. Although the Tribe may someday be able to provide such extensive services, it cannot do so now and the continued imposition of the state taxes hinder the Tribe’s ability to do so in the future.

Another significant issue for the Tribe is that we do not see a benefit from the taxes that are collected by the states. In Colorado, for instance, revenues acquired by the state from taxation of on-Reservation oil and gas activities are deposited into various funds, some of which are specifically designated for use in Montezuma County. None of the revenues serve the Tribe directly and we see no benefit from the taxes collected.

Similarly, the Tribe pays state property taxes for some of its ranches in Colorado which are held in fee and restricted fee, and yet we have a very difficult time obtaining services for these ranches that would be available to any other tax payer, such as law enforcement.

Taxation also carries with it an implied right to regulate through audits and other regulatory functions. Tribes are experiencing a high number of audits from the Internal Revenue Service based upon the tribes' obligations to pay certain federal employment taxes. The states of Colorado and Utah assert the right to inspect the Tribe's underground fuel storage tanks and to impose sanctions if the tanks are not properly maintained.

Finally, everything the Tribal government does is for the purpose of helping its members and its employees. State and federal taxation hinders the Tribe's ability to act in promotion of these interests. If the Tribe desires to impose a tax or a fee in order to defray its costs and the activity is already taxed by the state or the United States, then the contactors paying the taxes are exposed to higher taxation than they would experience off the Reservation, thus making on-Reservation work much less attractive. When Tribal activities are unencumbered by state and federal taxation, then the Tribe can best determine how to receive compensation for the services it provides. In order to remain competitive and secure contracts for economic development activities, the Tribe may wish to levy fees and taxes, or it may not, but at least the Tribe gets to make the determination based upon what it feels is necessary for its people.

The Ute Mountain Ute Tribe strives for independence. The Tribe is proud of its heritage and the Ute people have demonstrated strength in stamina, perseverance, and foresight. There will be a day when the Tribe can survive on its own, as it did for centuries before European settlers arrived. The Ute people will not always be dependent upon the states and the federal government for assistance. A day will come when the Ute Mountain Ute Tribe can stand with its neighbors as an equal, able to assert its sovereignty for the betterment of all people, but this day will not come soon enough if the Tribe continues to have to accommodate the taxation regimes that are imposed on its activities without its consent.

Thank you, again, for this opportunity. If there is any other assistance I can provide as you take on this very important work, please do not hesitate to ask.

Respectfully submitted,



Peter Ortego