UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Fond du Lac Band of Lake
Superior Chippewa,

Plaintiff,

CIV. NO. 09-00385 (PAM/RLE)

v.

Ward Einess, in his official capacity
as the Commissioner of the Minnesota
Department of Revenue,

Defendant.

MEMORANDUM OF DEFENDANT WARD EINESS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The United States Supreme Court recognizes the "well-established principle of interstate and international taxation" that authorizes a State to "tax all the income of its residents, even income earned outside the taxing jurisdiction." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463, 115 S.Ct. 2214, 2222 (1995). Given this scope of state tax authority, the Indian income tax immunity rule adopted in *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 93 S.Ct. 1257 (1973), "does not operate outside of Indian Country." *Chickasaw Nation*, 515 U.S. at 464, 115 S.Ct. at 2223.

These principles dictate denial of the summary judgment motion brought by The Fond du Lac Band of Lake Superior Chippewa ("the Band") for several reasons. First, while it is undisputed that the two tribe members whose income is at issue live on the Band's Reservation, there are no facts showing that the pertinent income is derived from Reservation sources. When income is not so derived, but is earned outside the Reservation (or Indian Country), the tribe member is subject to the "well-established principle of interstate and international taxation" applicable equally to all state citizens. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 1270 (1973) ("Indians going beyond Reservation boundaries have generally been held subject to nondiscriminatory state law applicable to all citizens of the State."). The Supreme Court endorses this tax authority because the State's strong interest in taxing income generated by off-reservation activities is not usurped by tribal sovereignty.

Second, upholding Minnesota's tax on income derived from outside the Reservation does not and will not infringe on the Band's inherent sovereignty. The

Band's sovereign power to impose its own income tax, whether or not exercised, cannot interfere with Minnesota's right to tax income earned outside the Reservation. *See Chickasaw Nation*, 515 U.S. at 466, 115 S.Ct. at 2222. Nor are there constitutional impediments to Minnesota's assertion of its taxing authority because Reservation residents are citizens of and domiciled in Minnesota.

Third, the Band fails to acknowledge the disputed facts that bar the broad relief its Motion seeks. For example, although the Band refers to "numerous other similarly situated" Band members who are alleged to earn income from sources outside the Reservation, there are no facts about those Band members or the source of their alleged income - only allegations. The only undisputed facts before the Court concern the taxability of pension income, and for one category of that income — military pension income — the parties agree that it is not subject to Minnesota's income tax. In the absence of material, undisputed facts that implicate the *McClanahan* tax immunity principle — income derived wholly from Reservation sources and earned by Band members residing on the Reservation — the Band's summary judgment motion must be denied. *See Oklahoma Tax Comm'n v. Sac And Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985 (1993) (remanding in part where lower court erred in failing to consider both prongs of *McClanahan* tax immunity principle).

For these reasons and as explained further below, Defendant Ward Einess (hereafter "the State") respectfully requests that the Court deny the Band's Motion for summary judgment in its entirety.

STATEMENT OF FACTS

The Band relies on some facts that are undisputed, some facts that are disputed or mere allegations, and some facts that are not part of the record. The following facts are undisputed.

There is no dispute that the two Band members mentioned in the Complaint, Mr. Houle and Mr. Diver, are enrolled members of the Fond du Lac Band of Lake Superior Chippewa ("the Band"). *See* State's Answer to Amended Compl., ¶ 6 (filed Aug. 10, 2009); Exh. F., Band Motion for Summ. J.[1] The parties also agree that Mr. Houle and Mr. Diver lived on the Band's Reservation when they received the income at issue here. Exh. D, Houle Aff., ¶ 3; Exh. G, Diver Aff., ¶ 7. Next, it is undisputed that income Mr. Houle and Mr. Diver (and with other residents of the Band's Reservation) may receive from Reservation sources, e.g., wages for on-reservation employment, or distributions from an on-reservation casino's profits, is exempt from Minnesota's income tax. Affidavit of Pamela Dahlstrom, ¶¶ 2, 3 & Exh. A.

Finally, it is undisputed that both Mr. Diver and Mr. Houle receive income derived from work they performed outside the Reservation and outside Minnesota. For example, Mr. Houle receives pension payments based on his service, off the Reservation, with the United States Army. Exh. D, Houle Aff., ¶¶ 4-5. The parties agree that Mr. Houle's

[1] In its Answer to the Amended Complaint, the State denied the allegations in Paragraph 8 related to Mr. Diver's enrolled status. The Enrollment Clerk's Affidavit (Ex. F to Band Mem.) sufficiently established the Complaint's allegations and therefore Mr. Diver's enrollment status is undisputed.

military pension income is exempt from Minnesota's income tax. *See* Dahlstrom Aff., ¶ 7 & Exh. A (explaining Minnesota's position on exempt status of military pension income).[2] Mr. Diver receives pension payments from his union, based on his work outside the Reservation and outside of Minnesota between 1967 and 1997, with Yellow Freight System, in Cleveland, Ohio. Diver Aff., ¶¶ 5, 8.

The Band challenges Minnesota's income tax on Mr. Diver's Yellow Freight pension income. *See* Mem. In Support of Band's Motion at 5 (hereafter "Band Mem."). Mr. Diver also earns and/or reports income from sources other than the Yellow Freight pension income, although the Band does not explain whether its Motion encompasses

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[2] A Minnesota resident's pension income is generally subject to state tax. *See, e.g.*, Hellerstein & Hellerstein, State Taxation, ¶ 20.07[2](a) (2009) (explaining states' power to tax pension income); *see also Meunier v. Comm'r of Revenue*, 503 N.W.2d 125 (Minn.) (upholding tax on pension income), *cert. denied*, 510 U.S. 1024, 114 S.Ct. 635 (1993). The Department recently agreed that military pension income received by American Indians who entered military service when they resided on a Reservation is exempt from Minnesota's income tax. Judicial and administrative authorities have addressed only the tax-exempt status of active duty military *pay*, not the tax status of military *pension* income. *See Fatt v. Utah State Tax Comm'n*, 884 P.2d 1233, 1235 (Utah 1994) (recognizing that tax exemption in Soldiers' & Sailors' Civil Relief Act "forecloses the host state" from taxing the pay of service persons temporarily assigned to that state, and therefore, American Indian in military service should not bear a tax burden that would not otherwise arise without leaving the Reservation); *State Taxation of Income Of Certain Native American Armed Forces Members*, 2000 Westlaw 34475734 at *8-9 (Off. Legal Counsel, Nov. 22, 2000) (since compulsory military presence does not subject service member to tax liability that does not already exist, Reservation resident who does not work outside the Reservation is not subject to tax on military pay by the State in which the Reservation is located) (copy attached, Exh. C to Band Mem.). Logically, if the Band member's military income was exempt because the member entered active duty service while living on the Reservation, then the pension income derived from that same employment should be exempt. *Cf. Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113-14, 118 S.Ct. 1904, 1910 (1998) (rejecting argument that tax exempt status can be revived once lost).

Minnesota's tax on that income. *See* Diver Aff., Exh. C (reporting income that exceeds union pension income). The Band has not identified any facts that suggest Minnesota does not have authority to tax this reported, non-Yellow Freight pension income.[3]

Finally, it is undisputed that the Band and the State exchanged letters between October, 2008 and December, 2008, stating their respective positions on the State's authority to tax the income earned by Band members outside the Reservation and outside of Minnesota. Exhs. H, I, Band Mem.

There are, however, disputed or missing facts that preclude the broad relief the Band seeks.

For example, there are no facts before the Court about the "numerous other similarly situated members of the Fond du Lac Band" who are alleged to reside within the Reservation and to earn income from sources outside the state of Minnesota. *See* Band's Br. at 5. The Band has merely alleged that such circumstances exist. *Id*. The State sought discovery on the identity of these individuals, the income received by these individuals, and the nature of that income (passive, investment, employment), but the Band does not have access to that information. *See* Affidavit of Rita Coyle DeMeules, Exh. 2. The Band therefore has not proffered any facts about income that may be earned

[3] Mr. Diver claims the American Indian income subtraction on his 2008 Minnesota individual return, which the State does not challenge. *See* Diver Aff., Exh. C. However, it appears from Mr. Diver's exhibits that his income includes more than the Yellow Freight pension income and the exempt on-reservation income. *See* Dahlstrom Aff., ¶ 10.

outside of Minnesota by Band members, other than the pension income reported by Mr. Houle and Mr. Diver.

Thus, to the extent that the Band seeks a ruling that applies to all members who reside on the Reservation and are alleged to earn income outside the Reservation and outside the State, the facts do not support that broad relief. *See* Fed. R. Civ. P. 56 (c).

ARGUMENT

Minnesota taxes the income earned by residents of the state. *See* Minn. Stat. § 290.014, subd. 1 (2008) ("all net income of a resident individual is subject to tax"); Minn. Stat. § 290.01, subd. 7 (2008) (defining "resident"); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.02[2][c] at 910 (2005 Ed.) ("Indians living on tribal lands are residents of the state in which the reservation is located"). In the area of state taxation of tribes and tribal members, however, federal law prohibits "taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n.17, 107 S.Ct. 1083, 1091, n.17 (1987). This tax immunity principle does not extend beyond Reservation boundaries. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 153, 93 S.Ct. 1267, 1273 (1973).

This well-established dividing line — the State can tax the income earned from off-reservation activities but cannot tax income earned exclusively from reservation sources — accommodates the interests of both the Band and the State while preserving their respective sovereign taxing authority. The State's assertion of taxing authority over Band members'

non-reservation source income respects the Supreme Court's dividing line. Therefore, the Band's Motion for Summary Judgment must be denied.

I. THE *MCCLANAHAN* TAX IMMUNITY RULE EXEMPTS INCOME DERIVED FROM RESERVATION SOURCES. INCOME GENERATED OUTSIDE OF THE RESERVATION OR INDEPENDENT OF RESERVATION RESOURCES IS SUBJECT TO STATE TAX.

The Band contends that the State's tax on income generated outside the Reservation is barred absent express Congressional consent. *See* Band Mem. at 8-9. This broad overstatement fails to comprehend a critical distinction in the Supreme Court's Indian tax cases. As explained below, the State's interest in taxing income generated off the Reservation is strong. The Band's sovereign interests, in contrast, predominate only within Indian Country.

The Supreme Court has explained that a State cannot impose its income tax on Reservation Indians "*with income derived wholly from reservation sources*." *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 165, 93 S.Ct. 1257, 1259 (1973) (emphasis added). In contrast, a State can tax income generated by tribe members' activities occurring outside the Reservation. *See Mescalero Apache Tribe*, 411 U.S. 145, 93 S.Ct. 1267 (1973). The Supreme Court has also upheld state authority to tax the income earned by tribe members who do not live on the member's Reservation, even if the income is earned from Reservation resources. *See Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 464, 115 S.Ct. 2214, 2223 (1995). Consistently, when explaining the *McClanahan* tax immunity principal, the Supreme Court has limited its application to tribe members who both live on the Reservation *and* earn the pertinent income from Reservation sources. *See,*

e.g., Chickasaw Nation, 515 U.S. at 462, 115 S.Ct. at 2224; *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, 100 S.Ct. 2578, 2584 (1980) (recognizing that state law is generally inapplicable to "on-reservation conduct involving only Indians").[4]

As shown below, the Supreme Court's dividing line preserves tribal interests in self-government and economic independence, while also balancing similar state interests. When placed within this framework, Minnesota's tax on income generated outside the Reservation does not violate the *McClanahan* tax immunity principle.

A. The *McClanahan* Tax Immunity Principle Applies To Income Derived From Reservation Resources And Does Not Operate Outside Of Indian Country.

In *McClanahan*, the United States Supreme Court considered whether Arizona could tax a reservation Indian whose entire income was derived solely from reservation sources. 411 U.S. at 165, 93 S.Ct. at 1258. Because the relevant Navajo Treaty, state law, and

[4] Minnesota state courts have applied the Supreme Court's two-part requirement. *See, e.g., Jefferson v. Comm'r of Revenue*, 631 N.W.2d 391, 396 (Minn. 2001) (upholding state tax on Tribe's per capita payments received by tribe members who did not live in Indian country, and noting that *McClanahan* principle does not apply outside of Indian Country); *Brun v. Comm'r of Revenue*, 549 N.W.2d 91, 92 (Minn. 1996) (noting that state lacks taxing authority over enrolled tribe members living on Reservation "whose income is the result of their employment on the Reservation"); *Littlewolf v. Girard*, 607 N.W.2d 464, 466-67 (Minn. Ct. App. 2000) (recognizing that state cannot tax income "earned by Indians residing on a reservation when that income was wholly derived from reservation sources" and upholding tax on lottery proceeds that "constituted income earned off the reservation"). Other states have adopted and implemented the same approach. *See* Dahlstrom Aff., Exhs. B-G; *see also Esquiro v. Dep't of Revenue*, No. 3954, 1997 Westlaw 43194 (Or. Tx. Ct., Jan. 28, 1997) (upholding state tax on non-member's out of state income as "either of those conditions opens the door to the state's jurisdiction to impose a state income tax"), *aff'd per curiam*, 969 P.2d 318 (Or. 1998).

federal statutes collectively reflected an intent to exclude state jurisdiction within the Navajo Reservation, Arizona's tax on reservation income interfered with the Tribe's sovereign immunity and was "unlawful as applied to reservation Indians with income derived wholly from reservation sources." *Id*. at 165, 176-77, 93 S.Ct. at 1259, 1264-66; *see also id*. at 180, 93 S.Ct. at 1266 ("Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leaves for the Federal Government and for the Indians themselves."); *Oklahoma Tax Comm'n v. Sac And Fox Nation*, 508 U.S 114, 123, 113 S.Ct. 1985, 1990 (1993) (characterizing *McClanahan* as holding "that a State was without jurisdiction to subject a tribal member living on the reservation, *and whose income derived from reservation sources*, to a state income tax absent an express authorization from Congress") (emphasis added).[5]

[5] The Navajo Treaty and Arizona's Enabling Act included language and provisions that prohibited unauthorized persons from entering the Reservation, and excluded Arizona from taxing Indian Reservation land. *See McClanahan*, 411 U.S. at 174-76, 93 S.Ct. at 1263-64 (discussing provisions). Neither the LaPointe Treaty nor Minnesota's Enabling Act have comparable language or provisions. *See* Treaty of LaPointe, 10 Stat. 1109, Arts. 1, 2 (ceding lands to United States, which agreed to set apart reserved lands for Tribe's use) (Exh. A, Band Mem.); Act of Feb. 26, 1857, 11 Stat. 166 (authorizing Minnesota state government). The absence of such provisions does not necessarily sanction state authority over Reservation land or Reservation Indians, particularly given the liberal construction typically applied in construing such documents. *See McClanahan*, 411 U.S. at 174, 93 S.Ct. at 1263. Rather, the absence of such provisions diminishes their persuasive value in evaluating the Indian tradition of sovereignty to off-Reservation conduct. *See Chickasaw Nation,* 515 U.S. at 466-67, 115 S.Ct. at 2224 (noting that Treaty signatories "likely gave no thought to a State's authority to tax the income of tribal members living in the State's domain because they did not expect any members to be there"); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 100 S.Ct. 2069, 2082 (1980) (noting limited value of

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On the same day that it issued *McClanahan*, the Court recognized that "State authority over Indians is yet more extensive over activities . . . not on any reservation," and "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 1270 (1973); *see also id*. at 153, 93 S.Ct. at 1273 (recognizing that "off-reservation activities are within the reach of state law"). Applying these principles, the Court upheld New Mexico's gross receipts tax on the Mescalero Apache Tribe's off-reservation ski resort operations, but disallowed a state use tax on personal property permanently affixed to reservation land. *Id*. at 157-58, 93 S.Ct. at 1275-76; *see also Bryan v. Itasca County*, 426 U.S. 373, 376, n.2, 96 S.Ct. 2012, 2105, n.2 (1976) (noting that *McClanahan* preemption model "usually yields different conclusions as to the application of state laws to tribal Indians who have left" a reservation).

Next, in *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct. 2102 (1976), the Court struck down Minnesota's personal property tax on a Band member's mobile home, which was kept on a reservation. *See id*. at 377, 96 S.Ct. at 2105 (noting that *McClanahan* precludes "any authority in respondent county to levy a personal property tax" on the reservation property). The Court considered whether Public Law 280, 28 U.S.C. § 1360, was the "congressional consent" the *McClanahan* Court deemed necessary to uphold state tax authority over reservation property and concluded, based on the legislative history and

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Washington Enabling Act in construing tax authority over non-members and transactions "with no substantial connection to reservation lands").

applicable canons of construction, that the law could not be construed "to terminate Indian immunities." *Id*. at 379, 96 S.Ct. at 2106; *see also Moe v. Confederated Salish And Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480, 96 S.Ct. 1634, 1645 (1976) (striking down Montana's personal property tax on property located within the reservation, license fee for reservation vendor, and cigarette tax "as applied to on-reservation sales by Indians to Indians.").

Subsequently, the Supreme Court has upheld the exercise of state taxing authority on reservations for transactions with non-members, or on property without a substantial connection to the Reservation. *See, e.g., Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112-13, 126 S.Ct. 676, 687-88 (2005) (upholding fuel tax on non-Indian distributors that deliver fuel to tribe-owned, on-reservation station, and acknowledging state may impose non-discriminatory tax on "Indians who have gone beyond the boundaries of the reservation"); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 513, 111 S.Ct. 905, 911 (1991) (holding Indian retailer doing business on reservation obligated to collect state tax on cigarette sales made to non-members); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175, 109 S.Ct. 1698, 1707 (1989) (upholding state tax on non-member doing business on reservation with the Tribe, even though resulting financial burden may fall on Tribe); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 100 S.Ct. 2069, 2082 (1980) (upholding taxes on nonmembers and property "with no substantial connection to Reservation land").

Notably, the Court has repeatedly upheld state tax authority in the absence of any congressional consent, even when that authority reaches on-reservation activity, reservation residents, or reservation income. The Band thus incorrectly argue that state authority within reservation boundaries "requires clear congressional authorization." Band Mem. at 10. To the contrary, the absence of any congressional consent for the tax authorized, *e.g.*, in *Cotton Petroleum*, reflects a judicial rule deeming even certain on-reservation activities non-exempt. *Bryan* and *McClanahan*, in contrast, require such consent because the activity at issue was Indian-to-Indian only, or solely reservation property owned by an Indian. *See White Mountain Apache Tribe*, 448 U.S. at 144, 100 S.Ct. at 2586 (recognizing limitations on state interests "when on-reservation conduct involving only Indians is at issue"). In short, no such consent is required when the state's tax is directed at off-Reservation value. *See Mescalero Apache Tribe*, 411 U.S. at 156-57, 93 S.Ct. at 1274-75 (noting that Congress "should say so in plain words" if it intends to displace state law equally applicable to all citizens).

Further, these decisions are relevant even in the absence of an income tax because they dispel the categorical notion that states have no taxing authority over Reservation Indians, or even on reservations. *See* Band Mem. at 9 (arguing law presumes there is no state taxing authority within Indian country); *see also LaRock v. Wisconsin Dep't of Revenue*, 621 N.W.2d 907, 912-13 (Wis. 2001) (noting that "the nature of the tax was immaterial" in *Colville*). Even in the area of income taxation and a strong "federal tradition of Indian immunity from state taxation," the *McClanahan* immunity principle extends only to "reservation lands or Indian income from activities carried on within the boundaries of

the reservation." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n.17, 107 S.Ct. 1083, 1091, n.17 (1987); *see also Chickasaw Nation*, 515 U.S. at 458-59, 115 S.Ct. at 2220 ("If the legal incidence of an excise tax rests on a tribe or on tribal member *for sales made inside Indian country*, the tax cannot be enforced absent clear congressional authorization.") (emphasis added).

The distinction between on-reservation activities or value, and off-reservation activities or value, is critical because it accommodates the tribes' and the states' respective sovereign interests. *See, e.g., White Mountain Apache Tribe*, 448 U.S. at 144, 100 S.Ct. at 2584 (recognizing that "any applicable regulatory interest of the State must be given weight, and automatic exemptions as a matter of constitutional law are unusual.").[6] Thus, tribal interests are strongest where the value, monetary gain, or economic benefit sought to be taxed is generated by on-Reservation activities in which the Tribe has a significant interest. *See Id.* at 144, 100 S.Ct. at 2586 ("when on-reservation conduct involving only Indians is at issue," state regulatory interest is minimal compared to federal interest in encouraging tribal

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[6] The Band correctly points out that the usual tax law principle, construing exemptions narrowly, does not apply in Indian tax cases. *See* Band Mem. at 10. Here again, however, the application of either general tax law principles or the Indian law canons depends on whether the pertinent activity occurs on or off the reservation. Justice Rehnquist concurring and dissenting in part, explained *Mescalero's* "corollary principle" as follows: "When tradition did not recognize a sovereign immunity in favor of the Indians, this Court would recognize one only if congress *expressly* conferred one." *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. at 179, 100 S.Ct. at 2094-95 (emphasis in original). Since "no immunity for off reservation activities had traditionally been recognized," Justice Rehnquist understood that the *Mescalero* Court properly invoked the principal that tax exemptions are not granted by implication, and thereby upheld New Mexico's gross receipts tax for off-reservation activity. *Id*. at 179-80, 100 S.Ct. at 2095.

self-government); *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 901-02 (9th Cir. 1987) (coal mined on land in which Tribe retains interest is not subject to state tax because coal production is vital to Tribe's economic interests and a valuable resource to Tribe), *aff'd w/o op'n*, 484 U.S. 997, 108 S.Ct. 685 (1988).

In contrast, the state interest is "strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 156-57, 100 S.Ct. at 2083. Where the pertinent income or activities do not implicate a compelling tribal interest in self-government, the state's interest in taxing even certain on-reservation activities has been accommodated. *See Id.* at 155, 100 S.Ct. at 2082 ("It is painfully apparent that the value marketed by the smoke shops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest.").

For example, when the Chickasaw Nation challenged Oklahoma's tax on income earned by Tribe members who worked for the Tribe but lived off the Reservation, the Court stated that the Nation "gains no support from the rule that Indians and Indian tribes are generally immune from state taxation, as this principle does not operate outside Indian Country." *Chickasaw Nation,* 515 U.S. at 464, 115 S.Ct. at 2223 (citations omitted). Thus, the Court rejected the Tribe's attempt "to block the State from exercising its ordinary prerogative to tax the income of every resident," because the Tribe's sovereign interests are at their greatest only within Indian Country. *Id.* at 464-66, 115 S.Ct. at 2223.

Apart from the *Zeuske* decision (discussed below), no court has disallowed a state's tax on income earned off the Reservation. Further, the Supreme Court has consistently

applied the *McClanahan* tax immunity principle only when the record establishes both on-reservation residence and income generated by on-reservation activities. The Band thus broadens *McClanahan* far beyond its facts and holding, and then incorrectly chastises the State for failing to identify express Congressional approval for its non-discriminatory tax on off-Reservation activities that generate income.[7] The State's tax correctly respects the dividing line the Supreme Court has established because it is directed to off-Reservation activities.

B. The Record Does Not Establish That The Income At Issue Is Derived Solely From Reservation Resources Or Activities.

There are no facts before the Court that show the State is attempting to tax income generated solely or exclusively from Reservation activities, nor that the Band has any superior interest in members' income generated by off-reservation activities. Further, the mere receipt of income on the Reservation does not raise a protectable tribal interest and therefore, the *McClanahan* tax immunity principle is inapplicable.[8]

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[7] The Indian Relocation Program under which Mr. Diver obtained his Ohio employment, does not preempt Minnesota's income tax because it was an administrative program operated by the BIA, not Congress. *See* Band Mem. at 4, n.5. Further, given that the Band seeks to escape a tax on income generated by off-Reservation activities, Justice Rehnquist would have required the Band to show congressional approval for its claimed tax immunity. *See Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 185, 100 S.Ct. at 2098 ("Under *Mescalero*, it is dispositive of this case that no express immunity has been granted by Congress since the tradition of sovereignty counsels against the immunity.") (concurring in part, dissenting in part).

[8] As noted earlier, Mr. Houle's receipt of military pension income is no longer at issue in light of the State's recent announcement. *See* discussion, *supra* at 5.

Pension payments are deferred income, generated or derived from Mr. Diver's off-Reservation activities, namely his employment in Ohio. *See, e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808, 109 S.Ct. 1500, 1504 (1989) ("While retirement pay is not actually disbursed during the time the individual is working for [the employer], the amount of benefits to be received in retirement is based and computed upon the individual's salary and years for past service"). Of course, the pension income recipient does not realize the income until received during retirement. *See, e.g.*, Hellerstein & Hellerstein, State Taxation, ¶ 20.07[2](a) (2009) (discussing decisions sustaining state authority to tax deferred compensation payments upon receipt).

The Band does not explain why mere receipt of deferred income (or any income) by a Reservation resident — generated by off-Reservation activities or resources — justifies ousting the State's strong interests. *Cf. Cotton Petroleum Corp.*, 490 U.S. at 186, 109 S.Ct. at 1713 (suggesting state law may be excluded when "state has had nothing to do with the on-reservation activity, save tax it"). Here, the State's tax does not interfere with the Band's economic or self-regulation interests because the income was not generated by activities within Indian Country, or in which the Band has a significant interest. *Cf. White Mountain Apache Tribe*, 448 U.S. at 149, 100 S.Ct. at 2586 (noting, in disallowing tax on non-Indian's on-reservation logging operations, tribal interest in revenues generated by those operations); *see Maryboy v. Utah State Tax Comm'n*, 904 P.2d 662, 668-70 (Utah 1995) (upholding state tax on tribe member's income as county commissioner, even though member lived on reservation, district largely within reservation, and most of work on reservation; but striking down state tax on separate tribe member's

income where member resided on reservation and employment "depends entirely on the need or desire of" reservation residents), *cert. denied*, 517 U.S. 1220, 116 S.Ct. 1848 (1996).

Indeed, it is undisputed that the pension income was generated by employment in which the Band played no apparent role. In this context, the *Mescalero Apache Tribe* decision, which upheld a state tax on off-reservation activity, notwithstanding the Tribe's economic interest in the value generated by that activity is dispositive. In short, there is no apparent Band interest that supersedes the State's interest. *Mescalero Apache Tribe*, 411 U.S. at 148-49, 93 S.Ct. at 1270.

Further, Mr. Diver's employment income was taxable (though by a different state) because he did not reside on the Reservation and the income was not generated by Reservation activities. The Band cannot now claim that Reservation residency confers tax immunity on the deferred income generated by taxable activities. The Supreme Court's Indian tax decisions neither recognize nor sanction any expansion of the *McClanahan* tax immunity principle where that immunity did not attach originally. *See, e.g., Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113-14, 118 S.Ct. 1904, 1910 (1998) (rejecting argument that tax immunity can lay dormant, only to be revived when Band repurchases land); *see also Mescalero Apache Tribe*, 411 U.S. at 156, 93 S.Ct. at 1274 ("courts ordinarily will not . . . exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax").

Finally, there are no facts, let alone undisputed facts, about the Band members who allegedly receive income from out of state sources, such as employment, investments, and other pension payments, other than the allegation that they reside on the Reservation. Facts, not allegations, about the actual source of the Band member's income are obviously material to the outcome of this action as the *McClanahan* tax immunity principle does not apply to income generated by activities outside the Reservation. The Court cannot grant the Band's Motion for Summary Judgment on the basis of mere allegations, particularly mere allegations that do not completely address the factual basis for the *McClanahan* tax immunity principle. *See, e.g., Sac And Fox Nation*, 508 U.S. at 125-26, 113 S.Ct. at 1991-92 (holding that lower court erred in granting summary judgment solely based on source of income, and remanding to determine "whether the relevant tribal members live in Indian country").

Oklahoma's arguments in *Sac And Fox Nation*, and the Supreme Court's response, confirm that the Band cannot rely on the *McClanahan* tax immunity principle in the absence of undisputed facts establishing both Reservation residency and reservation source income for the "similarly situated" Band members. Oklahoma argued in *Sac And Fox Nation* that the "*McClanahan* presumption against jurisdiction comes into effect only when income is earned from reservation sources by a tribal member residing on the reservation." *Id*. at 123, 113 S.Ct. at 1990. The Court responded:

> [Oklahoma] is partially correct: The residence of a tribal member is a significant component of the *McClanahan* presumption against state tax jurisdiction. But our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction: it is enough that the member live in Indian country.

Id. at 123, 113 S.Ct. at 1990-91. Clearly, the Court's treatment of only *McClanahan's* residency prong implies that Oklahoma correctly recognized that tax immunity exists with two necessary prerequisites: income earned from reservation sources and a reservation residency. The logical conclusion is that Oklahoma was only "partially correct" in its explanation of these two elements because it excluded the broader concept of "Indian Country" from *McClanahan*'s reservation residency requirement. *Id*. at 125, 113 S.Ct. at 1992 (noting McClanahan applies "to all Indian country, and not just formal reservations").

The Band misapplies the *McClanahan* legal principle and fails to recognize the absence of a factual record that supports the broad relief it seeks. Its Motion should therefore be denied.

II. BAND MEMBERS WHO RESIDE ON THE BAND'S RESERVATION ARE MINNESOTA CITIZENS, DOMICILED IN THIS STATE. MINNESOTA CAN THEREFORE CONSTITUTIONALLY TAX THE INCOME EARNED BY ITS CITIZENS FROM SOURCES OUTSIDE THE STATE.

The Band argues that the privilege of residency on the Reservation is conferred by the Band, not the State, and therefore the State has no right to tax the income that Reservation residents earn outside of Minnesota. Band Mem. at 14. The Band also deems Reservation residents "state residents for some purposes," but not for tax purposes. *Id*. at 11, 17.

The logical conclusion, but illogical result, of the Band's position is that a Reservation resident is a state resident for tax purposes if the income is earned in Minnesota (and outside the Reservation), but not if the income is earned outside of Minnesota (and

outside of the Reservation).[9] As shown below, the Supreme Court has not sanctioned this variability. Rather, as state citizens and residents, Band members are subject to the same tax laws applicable to all Minnesota citizens unless the *McClanahan* tax immunity rule applies. *See, e.g., Mescalero Apache Tribe*, 411 U.S. at 156, 93 S.Ct. at 1274; *see also Jefferson v. Comm'r of Revenue*, 631 N.W.2d 391, 396 (Minn. 2001) (upholding state tax on Tribe's per capita payments received by tribe members who did not live in Indian country, and noting that *McClanahan* principle does not apply outside of Indian Country); *Brun v. Comm'r of Revenue*, 549 N.W.2d 91, 92 (Minn. 1996) (same).

A. Band Members Are Minnesota Citizens And Residents, Notwithstanding Their Reservation Location.

The Band holds the aboriginal rights of occupancy and possession stemming from its presence in Minnesota prior to Minnesota's statehood. *See, e.g., The Minnesota Chippewa Tribe v. United States*, 11 Cl. Ct. 221, 224 (Cl. Ct. 1986) (describing historical migration of Chippewa Tribe into Minnesota in the seventeenth century); *see also Oneida County, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 234, 105 S.Ct. 1245, 1251 (1985) (describing doctrine of discovery and aboriginal rights). The 1854 Treaty of LaPointe confirmed this occupancy right in the form of a permanent Reservation. *See United States v. Thomas*, 151 U.S. 577, 584, 14 S.Ct. 426, 429 (1894); *United States v.*

[9] The Band acknowledges the State's tax authority over Indians residing on the Reservation who earn income within the State, but then declares that such Indians are "effectively regarded as nonresidents for state income tax purposes." Band Mem. at 17. The Band does not explain how this inconsistent treatment can be reconciled with *Chickasaw Nation,* which upheld a state tax on reservation income earned by non-reservation residents, presumably based on the tribe members' state residency.

Cardinal, 954 F.2d 359, 364 (6th Cir. 1992) ("Extinguishment of aboriginal title usually has taken the form of . . . recognition of a permanent property right in a smaller tract of land, usually referred to as a 'reservation'").

In addition, as a sovereign, the Band holds the power to determine tribal self-government and to control internal relations. *See Nevada v. Hicks,* 533 U.S. 353, 360-61, 121 S.Ct. 2304, 2311 (2001) (describing tribal powers); *Smith v. Babbitt*, 100 F.3d 556, 558 (8th Cir.) (acknowledging tribal authority to determine membership), *cert. denied*, 522 U.S. 807, 118 S.Ct. 46 (1996). These rights and the Band's inherent sovereignty substantially restrict, though do not entirely exclude, the application of state law within the Reservation. *See, e.g., Nevada*, 533 U.S. at 361-62, 121 S.Ct. at 2311-12 (noting that Tribe's sovereign powers "do not exclude all state regulatory authority on the reservation" and in limited circumstances State may regulate "the activities of tribal members on tribal land");[10] *White Mountain Apache Tribe*, 448 U.S. at 142, 100 S.Ct. at 2582-83 ("Long ago the Court departed from Mr. Chief Justice Marshall's view that the laws of a State can have no force within reservation boundaries.").

Where permitted, state authority within a reservation exists because the Reservation is considered part of the State in which it is located. *See Nevada*, 533 U.S. at 361, 121 S.Ct. at 2311 ("Ordinarily, it is now clear, an Indian reservation is considered part of the territory

[10] The Court also implicitly acknowledged that distinctions in treaty language may be relevant in determining the extent to which a State is excluded from a Reservation. *See id*. at 363, n.5, 121 S.Ct. at 2312, n.5 (noting some reservations were "not excluded from the territory of a State by treaty"); *see also supra* n.5.

of the State."); *see also Sac And Fox Nation of Missouri, et. al. v. Pierce*, 213 F.3d 566, 577 (10th Cir. 2000) (acknowledging that reservations are part of Kansas), *cert. denied*, 531 U.S. 1144, 121 S.Ct. 1078 (2001); *Shakopee Mdewakanton Sioux v. City of Prior Lake*, 771 F.2d 1153, 1156 (8th Cir. 1985) (noting that Band's sovereign powers and trust status of reservation lands "does not prevent the reservation from constituting a portion of a state"), *cert. denied*, 475 U.S. 1011 (1986).

Further, Tribe members are citizens of the United States and the state in which they live. U.S. CONST., amend. XIV, § 1; *see also Shakopee Mdewakanton Sioux Community*, 771 F.2d at 1156 (noting that state and local citizenship are derivative of federal citizenship); *Meyers v. Bd. of Educ. of San Juan*, 905 F. Supp. 1544, 1576 n.39 (D. Utah 1995) ("The law is now well-settled that Indians living on a reservation are citizens of the state where the reservation is located."); *Goodluck v. Apache County*, 417 F. Supp. 13, 16 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976) (recognizing, in an apportionment challenge, that reservation Indians are state citizens); *Acosta v. San Diego County*, 272 P.2d 92, 98 (Cal. Ct. App. 1954) (finding that Reservation Indians are California residents and noting that neither reservation residency nor exemption from some state laws "is determinative of the question of their residency").

Indeed, the Supreme Court's decisions upholding state tax and regulatory authority over on-Reservation activities implicitly recognize that Tribe members are residents of the State, not simply the Reservation. *See, e.g., Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 158-60, 100 S.Ct. at 2083-84 (upholding state recordkeeping and tax collection requirements for Tribe's sales to non-members); *Confederated Salish And*

Kootenai Tribes of the Flathead Reservation, 425 U.S. at 482-83, 96 S.Ct. at 1646 (holding state can require reservation seller to collect tax from non-reservation buyer); *see also Dep't of Taxation v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73-74, 114 S.Ct. 2028, 2034 (1994) ("This is another case in which we must reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations" and upholding state regulatory requirements for distributors' on-reservation cigarette sales). That is, the Tribes and Tribe members are present in the state by virtue of their residency therein. The Supreme Court has therefore upheld the non-discriminatory application of state law to those citizens, even when doing so allows the exercise of state authority within the Reservation. *See Mescalero Apache Tribe*, 411 U.S. at 148-49, 93 S.Ct. at 1270; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.02[2][c] at 910 (2005 Ed.) (explaining that tribal lands are part of the state within which they are located, and "Indians living on tribal lands are residents of the state in which the reservation is located").[11]

Minnesota imposes an annual tax on the taxable income of its residents. Minn. Stat. § 290.03(1) (2008). A "resident" subject to Minnesota's income tax is either "domiciled" in the state or a nondomiciliary resident who maintains an abode in Minnesota and spend more than half the year in the state. Minn. Stat. § 290.01, subd.

[11] In addition, characterizing the *McClanahan* principle as an "immunity" from tax implies that tribe members are state residents because absent that immunity, those members would be subject to tax due to their state resident status. *See* BLACK'S LAW DICTIONARY at 752 (defining "immunity" as "an exemption from a duty or liability") (7th Ed. 1999).

7(a), (b); *see also Luther v. Comm'r of Revenue*, 588 N.W.2d 502, 506-07 (Minn. 1999). Minnesota's income tax is:

> founded upon the protection afforded to the recipient of the income by the government [of the commonwealth of his residence in his person], in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference.

Luther, 588 N.W.2d at 509 (quoting *Maguire v. Trefry,* 253 U.S. 12, 14 , 40 S.Ct. 417 (1920) (bracketed text in original)).

Reservation residents fall squarely within either the domiciliary or nondomiciliary category of Minnesota residency. As such, they enjoy the privileges provided by state government. Nevertheless, Minnesota's income tax is not merely a quid pro quo for services provided. *See* Band Br. at 11. Payment of taxes secures to the citizen "that derived from his enjoyment of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them and would involve the abandonment of the most fundamental principle of government: that it exists primarily to provide for the common good." *Carmichael, et. al. v. Southern Coal & Coke Co.*, 301 U.S. 495, 522, 57 S.Ct. 868, 878-79 (1937) (citation om'd); *see also Cotton Petroleum Corp.*, 490 U.S. at 185, n.15, 109 S.Ct. at 1712, n.15 (recognizing that a "proportionality requirement" would "create nightmarish administrative burdens" while also

being antithetical to "the traditional notion that taxation is not premised on a strict *quid pro quo* relationship").

Like all Minnesota citizens, Reservation residents enjoy the benefits of "living in safety and freedom and of being protected by the law." *Luther*, 588 N.W.2d at 509; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.02[2][c] at 910 (noting that as state residents, Indians "cannot be denied benefits on the basis of nonresidence"). Thus, they enjoy the advantages equally available to all Minnesota citizens, such as public libraries, public education (including in-state tuition for higher education), public protection, and public health services. The State also contributes to many of the services Minnesota's Tribes provide to their members. *See, e.g.*, Minn. Stat. § 116J.8731 (making funds from Minnesota investment fund available to Indian tribal governments for financial assistance in economic development); Minn. Stat. § 122A.63 (establishing program to provide grants "for additional education for American Indian teachers"); Minn. Stat. § 134.32 (providing grants to experimental and innovative library programs with services for, among others, American Indians); Minn. Stat. § 256E.30 (providing financial assistance for community action programs on Reservations). *See, e.g., Jefferson*, 631 N.W.2d at 395 (recognizing State's right to impose income tax "is justified by the advantages, rights, and protections it bestows in return."). Thus, Minnesota can constitutionally tax the worldwide income of its residents, "even income earned outside the taxing jurisdiction." *Chickasaw Nation*, 515 U.S. at 463, 115 S.Ct. at 2222.

B. The Band Failed To Establish That Band Members Do Not Have A Minnesota Domicile. To The Extent The *Zeuske* Court Ruled As Such, It Erred In Its Application Of Domicile Principles.

The Band claims that Reservation residents are "domiciled" on the Reservation because they reside on the Reservation. *See* Band Br. at 14 (referring to "antecedent right of domicile"). Residency and domicile are state law issues, *see McClanahan*, 411 U.S. at 166, n.3, 93 S.Ct. at 1259, n.3.[12] As noted above, a Band member's Reservation residency does not exclude the Band member's legal status as a Minnesota resident. *See Brun*, 549 N.W.2d at 93 (noting the "unique status accorded individuals who, while 'domiciled' within the geographical boundaries of the State of Minnesota, 'reside' on the Reservation.").

The Band offers no facts, undisputed or otherwise, to support a conclusion that Band members are domiciled only on the Reservation and not in Minnesota. The domicile inquiry is broader than mere physical location. *See* Minn. Stat. § 290.01, subd. 7 (defining "resident" as individual "domiciled" in Minnesota); Minn. R. 8001.0300 (defining factors that establish Minnesota domicile). Given the longstanding recognition of Band members as Minnesota citizens and residents, *see, e.g*., *Goodluck*, 417 F. Supp. at

[12] In contrast, tribal immunity from civil suit is a federal law issue, "not subject to diminution by the States." *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751, 756, 118 S.Ct. 1700, 1703 (1998). The *Kiowa Tribe* decision therefore does not constrict the tax and residency principles addressed here. Even if *Kiowa Tribe* is relevant to this Motion, the decision is severely limited by the Court's deference to the role of the Legislative Branch on this particular issue, notwithstanding the Court's view that "reasons to doubt the wisdom of perpetuating" the immunity doctrines existed. *Id*. at 757-59, 118 S.Ct. at 1704-05.

16, and the multi-factor inquiry necessary to determine whether a taxpayer's domicile is outside of Minnesota, the Band's failure to present a complete factual record defeats its Motion.

The Band also relies on the federal district court's decision in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp.2d 969 (W.D. Wis. 2000). In this case, the court held that Wisconsin could not impose its tax on "tribal members who reside on the reservation and do not perform any income-producing work within the state of Wisconsin" because the Tribe member's Reservation residence did not confer the required nexus for the state to exercise its taxing authority. *Id*. at 971, 975. In the absence of that nexus, and notwithstanding the "close question" the case presented, the Court held that Wisconsin "cannot tax [the tribal member] solely because of his residency without running afoul" of the Supreme Court's decisions on Indian tax immunity. *Id*.

The *Zeuske* Court erred with its narrow focus on the Band member's reservation residency. While the Band member in *Zeuske* had a right to reside on the Reservation, conferred by his Tribe, that occupancy right does not as a legal matter exclude the Band member's status as a state resident. *See, e.g.*, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S.Ct. 1597, 1608 (1989) (noting that domicile "is not

necessarily synonymous with" residence because a person can have more than one residence but only one domicile).[13]

The *Zeuske* Court also erred because it failed to give effect to the Supreme Court's rule that "off-reservation activities are within the reach of state law." *Mescalero Apache Tribe*, 411 U.S. at 153, 93 S.Ct. at 1273. Indeed, the *Zeuske* Court's statement that "Congress has never authorized the states to tax tribal members" based on their residence within the taxing state, *see* 145 F. Supp.2d at 977, fails to acknowledge that the Supreme Court effectively presumes that state authority exists for activities outside the Reservation, thus making congressional consent unnecessary. *See Mescalero*, 411 U.S. at 148, 93 S.Ct. at 1270 ("tribal activities conducted outside the reservation present different considerations"). Logically then, off-reservation activities are within the reach of state law precisely because Reservation residents are also state residents. They are therefore "subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe*, 411 U.S. at 149, 93 S.Ct. at 270. The failure to reconcile its analysis with controlling Supreme Court decisions deprives the *Zeuske* Court's opinion of any persuasive value.

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[13] In holding that a Reservation domicile existed in that case the Court applied federal definitions of that term, rather than state law, because the statute at issue, the Indian Child Welfare Act, by its terms, purpose, and intent, did not rely on state law especially given that the ICWA was intended at times to displace state court jurisdiction. *Id*. at 43-45, 109 S.Ct. at 1605-06. Here, there is no overriding federal statutory regime that governs state taxation of Indians. Rather, the Supreme Court recognizes in Indian tax cases the "well-established principle of interstate and international taxation" that authorizes a State to "tax all the income of its residents, even income earned outside the taxing jurisdiction." *Chickasaw Nation*, 515 U.S. at 463, 115 S.Ct. at 2222.

Nor can the *Mescalero Apache Tribe* decision be limited to "off-reservation activities" occurring within the State, as the Band implicitly suggests with its proposed "state residents for only some purposes" standard. To do so would make the off-reservation source of the income dispositive, a result the Supreme Court long ago rejected. *See New York ex. rel. Cohn v. Graves*, 300 U.S. 308, 313, 57 S.Ct. 466, 468 (1937) ("income is not necessarily clothed with the tax immunity enjoyed by its source"). Indeed, the "fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-45, 61 S.Ct. 246, 250 (1940). The only limiting factor the Supreme Court has consistently required (in addition to Reservation residency) is income derived from Reservation activities or resources. *McClanahan*, 411 U.S. at 176-77, 93 S.Ct. at 1264-66; *Bryan*, 426 U.S. at 377, 96 S.Ct. at 2105.

Residency establishes a basis for the State's taxing jurisdiction. *See Cohn*, 300 U.S. at 313, 57 S.Ct. at 467. The Band has demonstrated only that Mr. Houle and Mr. Diver have resided on the Reservation for extended periods of time. Nothing in this showing strips them of their Minnesota residency, nor precludes the conclusion that, as Minnesota residents, they have enjoyed the advantages conferred by that status. This conclusion is even more apparent for those members who the Band alleges live on the Reservation but actively work outside of Minnesota. *See Bryan*, 426 U.S. at 376, n.2, 96 S.Ct. at 2105, n.2 (noting that *McClanahan* "usually yields different conclusions as to the application of state laws to tribe Indians who have left" a reservation).

Finally, the legal authority on which the *Zeuske* Court (and the Band) relied does not support the implicit conclusion that a Band member's Reservation residence deprives that member of state residency. The *Zeuske* Court cited, and the Band relies on, the decision in *Hunt-Wesson, Inc. v. Franchise Tax Board of California*, 528 U.S. 458, 120 S.Ct. 1022 (2000). The tax at issue in that case involved an interest expense deduction for an out-of-state taxpayer that did business in California, received nonunitary business income outside the State, and the interplay between the deduction and that income. *Id*. at 465, 120 S.Ct. at 1026. This nonunitary income is ordinarily, the Court noted, taxable only by the corporation's state of domicile, not simply any state in which the taxpayer does business. *Id*. California could not, however, tax nonunitary income received by a nondomiciliary corporation from activities occurring outside the State, and could not condition the availability of the interest deduction in a manner that effectively taxed that income. *Id*. at 464, 120 S.Ct. at 1026.

Notably, the parties in *Hunt-Wesson* conceded "that the relevant income . . . bears no rational relationship or nexus to California." *Id*. There is no such concession here. To the contrary, Band members are Minnesota citizens, a connection with the State that establishes its jurisdiction to tax. Band members who choose to leave the Reservation to pursue employment or other income-producing activities enjoy the advantages the State offers to its citizens as they pursue those activities. There is simply no corollary between the non-domiciliary status of a corporation with multi-state activities, and the domiciliary status of a Reservation resident that generates income from activities outside the Reservation.

III. MINNESOTA'S TAX ON INCOME EARNED OUTSIDE THE RESERVATION DOES NOT INFRINGE ON TRIBAL SOVEREIGNTY.

"'That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized.'" *Chickasaw Nation*, 515 U.S. at 463, 115 S.Ct. at 2222 (quoting *Cohn*, 300 U.S. at 312, 57 S.Ct. at 467). The Band argues, however, that imposing a tax on Reservation residents violates the LaPointe Treaty's promised Band insularity and the Band's inherent authority. *See* Band Mem. at 20.

The State agrees that the Band has sovereign tax powers. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 901 (1982). The Tribe's Treaty rights are not, however, a "supersovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits." *Chickasaw Nation*, 515 U.S. at 466, 115 S.Ct. at 2224; *see also Confederated Tribes of the Colville Indian Reservation,* 447 U.S. at 158, 100 S.Ct. at 2084 ("There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other"); *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1116 (9th Cir. 1981) (noting that "state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs"), *cert. denied*, 103 S.Ct. 230, 459 U.S. 916 (1982).

The Band argues that the State impermissibly interferes with its territorial sovereignty because the State's tax is "purely based on" Reservation residency. Band Mem. at 20. The Band misstates the State's position. The State's tax is permissible

because Band members are state residents who receive income in the State. *See, e.g., Chickasaw Nation*, 515 U.S. at 464, 115 S.Ct. at 2223 (rejecting Tribe effort "to block the State from exercising its ordinary prerogative to tax the income of every resident"); *Luther*, 588 N.W.2d at 507 (noting that Minnesota taxes the worldwide income of a state resident). As long as that income is not derived from Reservation employment or resources, the State's exercise of its ordinary taxing prerogative is permissible. *See Mescalero Apache Tribe*, 411 U.S. at 153, 93 S.Ct. at 1273 ("off-reservation activities are within the reach of state law").[14]

Tribe members who chose to reside on the Reservation, yet leave the Reservation to earn income outside of Minnesota, do not confer on the Band the right to interfere with

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[14] The two barriers to the state's asserted authority that were addressed in *White Mountain Apache Tribe,* 448 U.S. at 142, are not necessarily relevant because the State's tax authority is directed to off-Reservation activities. *See, e.g., Wagnon*, 546 U.S. at 112, 126 S.Ct. at 687 (limiting interest balancing tests in *White Mountain Apache Tribe* to on-reservation transactions). Nevertheless, neither test bars the State's tax authority here. First, there is no express federal law preempting Minnesota's sovereign authority to tax the worldwide income of its residents. *See Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 185, 100 S.Ct. at 2098 ("Under *Mescalero*, it is dispositive of this case that no express immunity has been granted by Congress since the tradition of sovereignty counsels against the immunity.") (Rehnquist, J., concurring in part, dissenting in part); *Cf. White Mountain Apache Tribe*, 448 U.S. 138, 145, 100 S.Ct. at 2581, 2584 (noting that Federal Government's "regulation of the harvesting of Indian timber is comprehensive," and timber operations accounted for over 90% of the Tribe's revenues").

Second, the state's tax authority does not "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them,'" *White Mountain Apache Tribe,* 448 U.S. at 142 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)), because it is directed here to value generated off the Reservation. *See Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 157, 100 S.Ct. at 2083 (noting state's interest is strongest "when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services").

Minnesota's sovereign right to tax the wage earner's worldwide income. The Supreme Court's decisions "upholding state taxes in a variety of on-reservations settings squarely forecloses" the Band's argument suggesting otherwise. *Arizona Dept. of Revenue v. Blaze Const. Co., Inc*. 526 U.S. 32, 37 n.2, 119 S.Ct. 957, 960, n.2 (1999); *see also Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 184, n.9, 100 S.Ct. at 2098, n.9 ("When two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other.") (Rehnquist, J., concurring in part and dissenting in part).

Indeed, states can tax property owned by non-Indians, even if that property is located within reservation boundaries because (as noted earlier) reservations are part of the State. *Thomas v. Gay*, 169 U.S. 264, 273, 18 S.Ct. 340, 344 (1898) (acknowledging that railroad property crossing reservation is subject to tax in state in which reservation is located). For the same reason, states can tax cigarette sales made by the Tribe, on the Reservation, to non-Indians or to non-member Indians, without interfering with tribal sovereignty. *Confederated Salish And Kootenai Tribes of the Flathead Reservation*, 425 U.S. at 483, 96 S.Ct. at 1646 (noting that nothing in Tribe's tax collection obligation for sales to non-Indians "frustrates tribal self-government"). The Supreme Court has also upheld the states' taxing authority even where the state tax overlaps with a tribal tax. *See Wagnon*, 546 U.S. at 114-15, 126 S.Ct. at 688-89 (noting "Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues"). Such state taxation of on-reservation activity or property, or in the context of competing taxes, represents a much

greater infringement upon tribal sovereignty than does state taxation of value generated by off-reservation activities.

Well-established principles allow for concurrent taxing authority between sovereigns, even where the tax reaches on-Reservation activities. Minnesota's tax is applied here to value generated by activities occurring outside the Reservation. Whether or not the Band elects to tax that value, Minnesota's tax does not interfere with tribal sovereignty. The Band's Motion must therefore be denied.

CONCLUSION

For all the reasons stated above, Defendant Ward Einess, in his official capacity as the Commissioner of the Minnesota Department of Revenue, respectfully requests that the Court deny the Band's Motion for Summary Judgment in its entirety.

DATE: October 2, 2009

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