No. 09-1002

In the Supreme Court of the United States

DAVID MICHAEL DAVIS,
Petitioner,

v.

THE STATE OF MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE STATE OF MINNESOTA IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Minnesota Supreme Court properly determine that the state court had subject matter jurisdiction over the traffic offenses of an Indian, who was issued a state traffic citation by the arresting Tribal officer under a law enforcement agreement with the County Sheriff, for driving conduct outside the defendant's "home" reservation?

2. Does the state have jurisdiction in Indian Country over the traffic offenses of an Indian committed in Indian Country outside his "home" reservation either under the preemption analysis of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) or over criminal offenses under Public Law 280, 18 U.S.C. §1162(a)?

3. If the Court is inclined to review the issues presented by the Petition, should the case be remanded for a determination of the status of the 1855 Mille Lacs Reservation and whether the offenses occurred in Indian Country?

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OPINIONS BELOW

The opinion of the Minnesota Supreme Court (Pet. App. 3a)[1] is reported at 773 N.W.2d 66 (Minn. 2009). The opinion of the Minnesota Court of Appeals is unpublished, but is reported at 2008 WL 2726950

[1] References to "Pet." Or "Pet. App." Refer to the Petition and Petition Appendix respectively. The Petition Appendix is unnumbered, so references are to the page numbers that would be assigned if numbered by Petitioner.

(Minn. App.) Pet. App. 26a. The Verdict and Order of the Minnesota District Court for the Seventh Judicial District, Court File No. CR-05-3441 are unpublished but are contained in Pet. App. 32a and 35a.

JURISDICTION

The Judgment of the Minnesota Supreme Court was entered on November 16, 2009, pursuant to Notice of Entry of Order. Pet. App. 1a. The Petitioner has invoked Supreme Court Rule 13 for review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort. Although unstated in the Petition for Writ of Certiorari, the Petitioner apparently seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257(a).

STATEMENT

1. On December 3, 2005, Petitioner David Michael Davis was driving on Highway 169 in Mille Lacs County, Minnesota. *Davis,* 773 N.W.2d at 67. Joshua Kimball, an officer with the Mille Lacs Tribal Police, was on patrol and observed Davis traveling at a high rate of speed. *Id.* After confirming with his radar equipment that Davis was traveling approximately fifteen miles per hour over the speed limit, Officer Kimball activated the emergency light on his squad car to initiate a traffic stop, but Davis continued driving. *Id.* Davis turned off Highway 169 onto Ataage Drive in North Kathio, Minnesota and stopped his vehicle. *Id.* The Minnesota Supreme Court assumed for the purpose of its opinion that the area

where Davis stopped the vehicle is land held in trust by the United States for the Mille Lacs Band of Chippewa Indians. *Id.* Davis is an Indian registered with the Leech Lake Band. *Id.* at 68.

Davis informed Officer Kimball that his vehicle was uninsured. *Id.* at 67. Officer Kimball determined that there was an outstanding warrant for Davis' arrest from a previous failure to provide proof of insurance in violation of state law. *Id.* Davis was arrested on the outstanding warrant, and Officer Kimball issued Davis a state citation for speeding and driving without proof of insurance. *Id.* These two new traffic offenses by Davis were treated by the Minnesota courts as violations of "civil/regulatory laws" under the analysis of federal law precedent in *State v. Stone*, 572 N.W.2d 725, 731 (Minn. 1997). *Davis*, 773 N.W.2d at 72, n. 4.

2. Minnesota state law provides "cross-deputization" authority for Mille Lacs Tribal Police, as licensed police officers, to act with the "same powers as peace officers employed by local units of government." Minn. Stat. §626.90, subd. 3 (2008). 773 N.W.2d at 67, n. 1. That statute authorizes an agreement between the Mille Lacs County Sheriff and the Mille Lacs Band to carry out the purposes of the Statute. Minn. Stat. §626.90, subd. 2(b) (2008). "The Mille Lacs County Attorney is responsible to prosecute or initiate petitions for any person arrested by" tribal officers acting under its authority. Minn. Stat. §626.90, Subd. 5 (2008). 773 N.W.2d at 67, n. 1. Minnesota is a Public Law 280 state with civil and criminal jurisdiction in all Indian Country within the state (except the Red Lake Reservation not at issue here). *Id.* at 69, n. 3.

3. The Minnesota Chippewa Tribe (MCT) is a federally recognized Indian Tribe with six member bands, including the Leech Lake Band and the Mille Lacs Band. *Id.* at 68. Davis is a registered member of the Leech Lake Band. *Id.* Davis is not a member of the Mille Lacs Band, and does not reside on Mille Lacs trust lands. *Id.* The Mille Lacs Band and the Leech Lake Band are also federally recognized Bands. 60 FR 9250, Department of the Interior, Bureau of Indian Affairs, *Indian Entities Recognized and Eligible to Receive Service From the United States Bureau of Indian Affairs*, (Feb. 16, 1995). That listing itself states that inclusion "does not resolve the scope of powers. . .over land or non-members." *Id.* [updated listing at 73 FR 18,553 (April 4, 2008)].

4. At the district court, Davis argued that the Minnesota courts lacked subject-matter jurisdiction because he was an Indian who committed an offense in Indian Country, and only the Tribal Court had jurisdiction. 773 N.W.2d at 68. The District Court denied Davis' motion, determining that the State has jurisdiction over traffic offenses committed on Indian reservations by non-members of the reservation, relying upon the Minnesota Supreme Court's decision in *State v. R.M.H.*, 617 N.W.2d 55 (Minn. 2000). 773 N.W.2d at 68. Davis waived his right to a jury trial and proceeded with stipulated facts under *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). Pet. App. 27a. The District Court found Davis guilty. Pet. App. 32a-33a. The Minnesota Court of Appeals affirmed, again finding state subject-matter jurisdiction. *State v. Davis,* 2008 W.L. 2726950 (Minn. App. 2008) p. *1. Pet. App. 26a, 31a.

5. The Minnesota Supreme Court granted review and affirmed. *State v. Davis,* 773 N.W.2d at 67. The Minnesota Supreme Court rejected the argument that its decision in *R.M.H.* had been superseded by *United States v. Lara*, 541 U.S. 193 (2004), which interpreted and applied the so-called "*Duro* fix," 25 U.S.C. §1301(2) (2000). 773 N.W.2d at 70-71. The Minnesota Supreme Court noted that *Lara* was a "federal criminal case that analyzes the application of the Double Jeopardy Clause to Indian and federal prosecutions." *Id.* *Lara* stated that the "*Duro* fix" change to inherent tribal criminal jurisdiction to prosecute all Indians was "a limited one" arising from already well-settled principles of Indian law. *Id.*, *citing* 541 U.S. at 204. *Lara* did not involve "interference with the power or authority of any State." *Id.*, *citing* 541 U.S. at 205. The Minnesota Supreme Court concluded that *Lara*'s broad inherent tribal authority language must be read within the confines of this Court's decisions that deal specifically with the question of state jurisdiction not present in *Lara*. *Id.* After reviewing several of this Court's decisions, including *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Minnesota Supreme Court determined that *Lara* had not disturbed the decision the Minnesota Supreme Court had reached in *R.M.H.* 773 N.W.2d at 71.

6. The Minnesota Supreme Court also rejected Davis' argument that the state lacks jurisdiction if there is not an express grant of jurisdiction under Public Law 280. 773 N.W.2d at 72. Davis' two traffic offenses of speeding and no proof of insurance were treated as "civil/regulatory" under *State v. Stone*, 572 N.W.2d at 731, which applied *Cabazon*. 773 N.W.2d at

72, n. 4. Finding that *Cabazon* rejected an "inflexible per se rule," the Minnesota Supreme Court conducted the preemption analysis under *Cabazon* to determine if the State could exercise jurisdiction. 773 N.W.2d at 72-73, *citing Cabazon*, 480 U.S. 214-16. The court determined that the State has a strong interest in ensuring traffic safety on state highways. 773 N.W.2d at 72. Enforcing Minnesota's traffic laws against Davis in state court did not interfere with federal or tribal interests. *Id.* at 72-74. While recognizing the federal interest in preserving Indian self-governance and autonomy, the Minnesota Supreme Court concluded that interest was strongest when the tribe regulates its own members. *Id.* at 74. Because the tribal self-governance interest at issue here was the claim that Davis should be subject to trial in the Mille Lacs Band Tribal Court, under Mille Lacs Band laws, when Davis is a member of the Leech Lake Band who does not reside on Mille Lacs Band lands, the self-governance interest of the Mille Lacs Band is not the same as if Davis was a Mille Lacs Band member. *Id.* at 74, 68. Conversely, Davis' argument that the self-governance interest of the Minnesota Chippewa Tribe was subject to interference was unsupported. *Id.* at 73-74. The Minnesota Chippewa Tribe does not have traffic laws, a court system, or other self-governance interests that were infringed by prosecuting Davis in state court. *Id.* The Minnesota Supreme Court concluded that preemption analysis does not bar Minnesota from prosecuting Davis for traffic violations in these circumstances, and affirmed the decision of the Minnesota Court of Appeals. *Id.* at 74.

7. Davis predicated his argument before the Minnesota courts on the premise that his traffic violations occurred on the Mille Lacs Reservation. 773 N.W.2d at 68. The Minnesota Supreme Court assumed, without deciding, that "Davis committed his offense in Indian Country because, as set forth below, even if Davis was in Indian Country, the district court has jurisdiction." *Id.* at n. 2. Davis refers to the "Mille Lacs Reservation" as the reservation established by the 1855 Treaty with the Chippewa, 10 Stat. 1165. Pet. 8. *See,* 1855 Treaty at Pet. App. 69a. In *United States v. Mille Lacs Band of Chippewa Indians,* 229 U.S. 498 (1913), this Court held there had been an "express relinquishment of the lands in the Mille Lacs Reservation" under the terms of the Nelson Act of 1889, 25 Stat. 642. 229 U.S. at 504. The United States obtained the cession of the Mille Lacs Band Reservation in the 1864 Treaty with the Chippewa, 13 Stat. 693. 229 U.S. at 501. The Mille Lacs Band nevertheless claimed a "right of occupancy" under the 1864 Treaty pursuant to Article 12 owing to their "good conduct" [siding with the United States against the Dakota in the 1862 Conflict]. *Id.* at 501-02. The Nelson Act Agreement, however, provided that the Mille Lacs Band "forever relinquish[es] to the United States the right of occupancy on the Mille Lacs Reservation" reserved by Article 12 of the Treaty of 1864. 229 U.S. at 504-05. *United States v. Mille Lacs Band* held that the Mille Lacs Reservation was expressly ceded and relinquished. *Id.*

This Court's 1913 decision on the relinquishment of the Mille Lacs Reservation is reflected in the Constitution of the Minnesota Chippewa Tribe ("MCT"). While the MCT Constitution expressly

refers to the "Reservations" of five constituent Bands, only the "non-removal Mille Lacs Band of Chippewa Indians" is described without a reservation. Preamble to the revised Constitution and Bylaws of the Minnesota Chippewa Tribe. Pet. App. 39a. What is today colloquially referred to as the Mille Lacs Reservation consists of parcels of trust lands later acquired by the United States for the benefit of the Mille Lacs Band. The Mille Lacs Reservation created by the 1855 Treaty was sold and relinquished by the 1864 Treaty and the Nelson Act, as this Court held ninety-seven years ago in *United States v. Mille Lacs Band.* The issue of whether the Mille Lacs Reservation still exists was never reached by the Minnesota Supreme Court, which assumed that the conduct occurred in Indian Country because that assumption did not affect the outcome of its decision that the State had subject matter jurisdiction over Davis. 773 N.W.2d at 69, n.2.

ARGUMENT

A. Summary of the Argument

The Court should deny the Petition for Writ of Certiorari. The Petition does not implicate an issue of urgent importance, nor does the Petition demonstrate that a conflict exists between the state courts or federal circuits on the issues presented. The Petitioner seeks to vindicate the self-governance interests of the Minnesota Chippewa Tribe ("MCT"), which has no traffic laws and no judicial system. 773 N.W.2d at 73-74. The Petitioner alleges that jurisdiction over these traffic offenses is vested solely in the Mille Lacs Band's Tribal Court and should be prosecuted as

violations of the Mille Lacs Band's statutes. *Id.* at 68. But the Mille Lacs Band entered into a law enforcement agreement pursuant to state statute whereby the arresting tribal officer issued a state law citation to Davis for prosecution in state court by the Mille Lacs County Attorney. *Id.* at 67, n. 1.

Although the Petition makes no reference to any statutory authority for jurisdiction, Petitioner apparently seeks to invoke jurisdiction under 28 U.S.C. §1257. It is questionable whether this Court should exercise jurisdiction when the determination of this case in the Minnesota courts turned largely on the interpretation and application of state law, the Mille Lacs Band statutes, and the MCT Constitution.

Because of the manner in which the case was decided, the record below remains incomplete on the evidentiary issues concerning reservation status. ["The State argues that because the offense was committed outside of Indian Country, the state court has jurisdiction." 773 N.W.2d at 68, n. 2] The Minnesota Supreme Court assumed, without deciding, that the traffic stop occurred in Indian Country on land held in trust for the Mille Lacs Band – not the Minnesota Chippewa Tribe. *Id.* at 67. The driving conduct itself, as opposed to the stop, occurred on Highway 169. *Id.* While Petitioner claims that the driving conduct occurred within the boundaries of the reservation created by the 1855 Treaty with the Mille Lacs Band (Pet. 8), Petitioner fails to cite this Court's decision in the *United States v. Mille Lacs Band*, which found that there had been "an express relinquishment of the lands in the Mille Lacs Reservation." 229 U.S. at 504. If the offenses occurred outside of Indian Country, the State of Minnesota

unquestionably had jurisdiction over Davis' offenses. *See, Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). Should this Court be inclined to grant the Petition, a remand for determination of the Reservation status issue should be required before all the issues presented by the Petition will be ripe for determination.

The Petition erroneously argues that the "*Duro* fix," 25 U.S.C. §1301(2) (2000), whereby Congress lifted the ban on inherent tribal jurisdiction over non-member Indians, as applied by this Court in *Lara*, bars state law enforcement activity. Pet. 13-19. To the contrary, *Lara* held that inherent tribal criminal jurisdiction would not operate to bar federal prosecution, despite an earlier tribal court conviction, under the Double Jeopardy Clause of the Constitution. 541 U.S. at 210. *Lara* expressly noted that no question of state law jurisdiction was presented, and *Lara* left unresolved "the question whether the Constitution's Due Process or Equal Protection Clauses prohibit tribes from prosecuting a non-member citizen of the United States." *Id.* at 205.

The Petitioner has cited no authority for the proposition that the "*Duro* fix" was designed to limit state jurisdiction, any more than the "*Duro* fix" limited federal authority to prosecute Billy Jo Lara for assaulting a federal officer. Nothing in the "*Duro* fix" references any Congressional intent to limit state jurisdiction under either P.L. 280 or the "preemption analysis" under *Cabazon*. *See* 25 U.S.C. §1301(2); *Cabazon*, 480 U.S. at 216. To read the language of the "*Duro* fix" as evidencing Congressional preemption of P.L. 280 would mean that all state criminal jurisdiction under P.L. 280 was voided because there is

no limit stated on "inherent power. . .to exercise criminal jurisdiction over all Indians." 25 U.S.C. §1301(2). Moreover, lifting the bar to inherent tribal **criminal** jurisdiction over all Indians is not an expression of statutory preemption of state **civil/ regulatory** jurisdiction. Far from finding preemption, the Court in *Lara* reached the opposite conclusion, holding that the federal sovereign could also prosecute Billy Jo Lara. 541 U.S. at 210. Given the serious and fundamental Due Process and Equal Protection arguments against tribal criminal jurisdiction over non-member Indians that remain unresolved by *Lara*, it creates no basis to support a state jurisdiction preemption argument. *Id.* at 205.

State jurisdiction in the absence of an express grant of jurisdiction rests on the preemption analysis laid down by this Court in *Cabazon*, 480 U.S. at 214-16. *Cabazon* adopted the test from *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983), that state jurisdiction is preempted if it interferes with federal and tribal interests reflected in federal law, unless the state interests are sufficiently strong to justify state authority. *Cabazon*, 480 U.S. at 216.[2] Petitioner Davis claims that state jurisdiction interferes with the tribal interests of the Minnesota

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[2] *Cabazon* concerned on-reservation enforcement of state laws that were deemed civil/regulatory in nature. Here the Minnesota Supreme Court assumed, without deciding, that the conduct occurred in "Indian Country," and that the stop occurred on land held in trust for the Mille Lacs Band. As noted in Section E, *infra*, p. 26, either this Court's decision in *United States v. Mille Lacs Band of Chippewa Indians* determined ninety-seven years ago that the Mille Lacs Band Reservation had been disestablished, or an issue remains in this case that requires determination.

Chippewa Tribe, but the factual predicate for such an assertion is lacking.

Davis is an Indian enrolled at the Leech Lake Reservation. 773 N.W.2d at 68. Davis is also a citizen of the United States, and a citizen of the State of Minnesota. Davis is **not** a member of the Mille Lacs Band whose laws and court system he seeks to involve in his effort to vindicate the self-governance rights of the Minnesota Chippewa Tribe. Pet. 8-9, n. 18. But the Mille Lacs Band, by the law enforcement agreement reached under state statute, and acting through Tribal Officer Kimball, issued to Davis the state law citations for speeding and driving without insurance on Highway 169. 773 N.W.2d at 67, n. 1. The Petition never addresses how tribal self-governance issues are infringed when state jurisdiction was invoked by the Mille Lacs Band. *Id.* This case simply lacks a sufficient factual basis on which a grant of certiorari is appropriate to vindicate the alleged state law infringement on tribal self-governance rights of the Minnesota Chippewa Tribe, when the MCT has neither laws nor a judicial system that would apply to Davis' driving conduct. *Id.* at 73-74.

Alternatively, Davis argues that state civil regulatory authority has been preempted under the exceptions to P.L. 280.[3] Pet. 32-37. Davis simply ignores the logical inconsistency of arguing that while P.L. 280 does not apply because the traffic violations are civil/regulatory, the exceptions to P.L. 280's grant of jurisdiction do apply. Further, Davis relies upon both the civil and criminal jurisdiction "exceptions" to

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[3] This issue was not addressed by the Minnesota Supreme Court's decision.

P.L. 280. *Id.* While citing the usufructuary exception in 18 U.S.C. §1162(b) to state jurisdiction over offenses committed by or against Indians (Pet. 6), Davis argues, as he must to avoid express P.L. 280 jurisdiction, that the driving offenses are civil/regulatory and therefore not criminal. Compounding this error, Davis' argument under §1162(b) creates an exception that would swallow the rule. Under the Petitioner's analysis, the protection of "hunting, trapping or fishing" treaty rights from state prosecution extends to all economic activity, including Davis' commute by vehicle to work in a casino. Pet. 9-11. This expansionist interpretation was rejected by *United States v. Gotchnik*, 222 F.3d 506, 510 (8th Cir. 2000), which found that usufructuary rights extend to modern hunting and fishing equipment, but not to "modern modes of transportation to reach desired hunting and fishing areas." *Id.*

The second Public Law 280 provision relied upon by Petitioner arises under 28 U.S.C. §1360, which governs state civil jurisdiction. Pet. 36. That "exception" requires that any "tribal custom or ordinance. . . not inconsistent with the civil law of the state, be given full force in the determination of civil causes of action. . ." 28 U.S.C. §1360(c). This "exception" is unavailing for three fundamental reasons. First, once again, if P.L. 280 applies to these traffic offenses, the State has an express grant of jurisdiction under 18 U.S.C. §1162(a). Second, Davis argues that the Minnesota Chippewa Tribe, not the Mille Lacs Band, has jurisdiction and self-governance rights that preempt the exercise of state jurisdiction. Pet. 8; *see also* Petitioner's Issues. Because the Minnesota Chippewa Tribe has neither traffic laws nor

a judicial system, the MCT has no inconsistent laws or customs that would impact state law application. 773 N.W.2d at 73-74. Third, the Mille Lacs Band law that Davis does seek to invoke includes the law enforcement agreement between the Band and County Sheriff under state law. *Id.* at 67, n. 1. Mille Lacs Band Officer Kimball was acting under that agreement when he issued Davis the citation for traffic offenses to be prosecuted in state court. *Id.* Not only is the prosecution of Davis in state court "consistent" with Mille Lacs Band law, but state jurisdiction was invoked by the Mille Lacs Band officer. *See* 28 U.S.C. §1360(c); 773 N.W.2d 67, n. 1. Public Law 280 does not preempt state jurisdiction under these facts.

B. The State's Exercise of Jurisdiction Over the Traffic Offenses Committed by Davis Was Valid under *Cabazon's* Preemption Analysis.

The Minnesota Supreme Court treated the driving offenses of speeding and driving without proof of insurance as "civil/regulatory" offenses.[4] *Davis*, 773 N.W.2d at 72, n.4. The "civil/regulatory" classification of the traffic offenses follows the decision in *State v. Stone*, which considered and applied the principles set forth in *Cabazon*. *See State v. Stone,* 572 N.W.2d at 729-731. Because it classified Davis' driving offenses as "civil/regulatory," the Minnesota Supreme Court decided that P.L. 280 did not provide an express grant of state jurisdiction. 773 N.W.2d at 69, 72, n. 4.

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[4] *See* Argument at Section D, p. 22, *infra* on whether the traffic offenses were properly classified as civil/regulatory.

Instead the court applied the preemption analysis under *Cabazon*. *Id.*, 773 N.W.2d at 72.

The Minnesota Supreme Court rejected the argument that the absence of an express grant of jurisdiction under P.L. 280 bars any enforcement activity as an "inflexible per se rule." *Id.*, *citing Cabazon*, 480 U.S. at 214-16. Instead, the court conducted a preemption analysis to determine whether state law would apply: "state jurisdiction is pre-empted. . .if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Davis*, 773 N.W.2d at 72, quoting *Cabazon*, 480 U.S. at 216 and *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 333-34. The Minnesota court determined that it needed to "weigh the competing interests at stake" within the "specific factual context" presented. *Davis,* 773 N.W.2d at 72, *citing R.M.H.*, 716 N.W.2d at 64.

The State has a strong interest in ensuring traffic safety on state highways, and prosecuting Davis in state court for conduct in violation of state traffic laws furthers this strong interest. *Davis*, 773 N.W.2d at 72. The court also found that Minnesota's traffic laws are not inconsistent with federal pronouncements on this topic, noting that the federal government has not imposed a detailed scheme of traffic regulation on tribal reservations and has demonstrated little interest in the enforcement of traffic laws on state-operated and maintained highways. *Id.* at 73, *citing R.M.H.*, 617 N.W.2d at 65. The court noted a marked contrast with the circumstances in *Cabazon* where the federal policy of promoting tribal self-sufficiency through bingo parlors was precisely what California

sought to prevent. 773 N.W.2d at 73, *citing Cabazon*, 480 U.S. at 218, 220.

The only well-recognized federal interest potentially implicated was preserving Indian self-governance and autonomy. *Davis* at 73, Pet. App. 16a, *citing Cabazon*, 480 U.S. at 216 and *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 334-35. Davis argued that the Minnesota Chippewa Tribe's self-governance interest was implicated in this case. 773 N.W.2d at 73. The Minnesota Supreme Court held that state prosecution did not interfere with the self-governance rights of the Minnesota Chippewa Tribe. *Id.*

Although acknowledging that the Mille Lacs Band was a constituent member of the Minnesota Chippewa Tribe, the court noted that the Mille Lacs Band statutes made clear that the political rights of the Band derive from the "inherent and aboriginal rights of the people of *the Band* to self-government." *Id.* The Band did not delegate to the MCT, but reserved to itself the power to maintain Band government. *Id.* at 73-74. The Mille Lacs Band, pursuant to its own statutes, possesses a government that includes a judicial branch, whereas the MCT does not have a judicial branch or its own court. *Id.* While Davis' conduct violated traffic laws of the Mille Lacs Band, the conduct does not violate laws of the Minnesota Chippewa Tribe. *Id.* Because Davis is not a member of the Mille Lacs Band, the operation of state law to

Davis' conduct in Indian Country[5] does not infringe on the Band's self-governance interest. *Id.* at 74. Though Davis claimed that the interest of self-governance was implicated because of the structure of the MCT, the Minnesota Supreme Court found that any self-governance interest rests, not with the MCT, as Davis argues, but with the Mille Lacs Band. *Id.*

The self-governance interest of the Mille Lacs Band was not implicated by state prosecution. *Id.* The Mille Lacs Band officer issued the state citation to Davis for prosecution in state court by the County Attorney, pursuant to the law enforcement agreement between the Band and the County Sheriff. *Id.* at 67, n.1. This law enforcement agreement is properly treated as one of the "exceptional circumstances [where] a State may assert jurisdiction" under *Cabazon*, 480 U.S. at 215, *citing New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 331-32. *See Duro v. Reina*, 495 U.S. 676 (1990). "States may, with the consent of the tribes, assist. . .by punishing minor crimes." *Id.* at 697.

The Minnesota Supreme Court further rejected the argument that state jurisdiction under *Cabazon*'s preemption analysis had been effectively overruled by *Lara*'s application of the "*Duro* fix." 773 N.W.2d at 71. In *Duro v. Reina*, the Court held that tribes lack criminal jurisdiction over non-member Indians. 495 U.S. at 688. Congress subsequently over-ruled *Duro* by statute, recognizing "the inherent power of Indian

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[5] The court assumed that Davis' conduct occurred in Indian Country, but declined to address the State's argument that Highway 169 was outside of Indian Country, and the state court therefore had jurisdiction. *Davis*, 773 N.W.2d at 68, n.2. *See* Argument at Section E, page 26, *infra*.

tribes. . .to exercise criminal jurisdiction over all Indians." 25 U.S.C. §1301(2) (2000). This statutory amendment is known as the "*Duro* fix." *Id.*

The Petitioner argues that the treatment of the "*Duro* fix" by *Lara* effectively over-ruled the Minnesota Supreme Court's decision in *State v. R.M.H.*, which predated *Lara* and the "*Duro* fix." *R.M.H.* held that the State of Minnesota could exercise jurisdiction over civil/regulatory traffic offenses committed by an Indian on a reservation where that person was not a member. 617 N.W.2d at 64-65. Davis argues that the principles enunciated by *R.M.H.* are inconsistent with *Lara*'s view of inherent tribal authority in light of the "*Duro* fix." Pet. 3.

The Minnesota Supreme Court began by noting that *Lara* described its holding that Congress could restore the tribes' inherent authority to prosecute all Indians as a "limited one" arising from well-settled principles of Indian law. *Davis*, 773 N.W.2d at 71, *citing Lara*, 541 U.S. at 204. *Lara* specifically stated that its decision did not involve "interference with the power or authority of any state." 773 N.W.2d at 71, *citing Lara,* 541 U.S. at 205. Finally, the Court in *Lara* made clear that it did not reach "the question whether the Constitution's Due Process or Equal Protection Clauses prohibit tribes from prosecuting a non-member citizen of the United States." *Lara* at 205.

The concurring opinion of Justice Kennedy expressed concern that pronouncements in the Court's opinion went beyond the limited holding that the tribal prosecution of Billy Jo Lara was not a delegated federal prosecution, and therefore his Double Jeopardy argument must fail, to reach issues under the

Constitution that are "most doubtful." *Lara* at 211. (Kennedy, J. concurring). Justice Kennedy was clearly troubled by the concept that a citizen of the United States could be subjected to sovereignty outside the basic structure of the Constitution which is based on the original and continuing consent of the governed. *Id.* at 212. The Constitution provides every citizen the protection of two governments, the nation and the state, with each sovereign required to respect the proper sphere of the other. *Id.* at 212. While there is an historical exception for Indian tribes, that exception has been justified by the claim that a member of the tribe consents to be subjected to the jurisdiction of his own tribe. *Id.* at 212. The Court's Opinion reserves the Due Process and Equal Protection Clause issues for future determination, but Justice Kennedy remained concerned that the majority ignored the principle that the constitutional structure was in place before the Fifth and Fourteenth Amendments were adopted. *Id.* at 213. "The political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights." *Id.* at 214.

Lara describes its holding as "limited" and not reaching state jurisdictional issues, while leaving open future challenges to tribal criminal jurisdiction over non-member Indians under the Equal Protection and Due Process Clauses. *Lara* at 204-05. Consequently, the Minnesota Supreme Court properly found that *Lara* had not disturbed its preemption analysis in *R.M.H. Davis,* 776 N.W.2d at 71.

C. The Exceptions to Public Law 280 are Inapplicable to the State's Jurisdiction Over Davis.

Davis argues that two "exceptions" to P.L. 280 jurisdiction operate to divest the State of Minnesota of jurisdiction.[6] Pet. 32-36. Davis finds himself in the difficult position of arguing that while P.L. 280 does not provide an express grant of state jurisdiction for these traffic offenses because they are "civil/ regulatory," the "exceptions" to P.L. 280 still apply.[7] Davis argues that the first exception, protecting the exercise of usufructuary rights, is found in both the civil and criminal provisions of P.L. 280. To the contrary, the exception to hunt, fish, or trap is found only in the criminal jurisdiction provision of 18 U.S.C. §1162(b). Davis argues that his automobile is his "new canoe" that he is using to exercise his modern rights to hunt, fish or gather [the term "gather' is not in §1162(b)], which is the modern equivalent of the exercise of his usufructuary rights. Pet. 9-11, 43. Davis is seeking an exception to the criminal law enforcement of P.L. 280 that would swallow the rule, because anyone traveling to or engaged in any economic activity would be exercising their treaty-based usufructuary rights. This view has been rejected by the Eighth Circuit's decision in *United*

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[6] The P.L. 280 "exceptions" issue was not addressed by the Minnesota Supreme Court's decision.

[7] The creation of "civil/regulatory" and "criminal/prohibitive" classifications are contrary to the express language of §1162 of P.L. 280 that refers to jurisdiction over "offenses" committed by or against Indians, and applies state criminal law uniformly in Indian Country. 18 U.S.C. §1162(a). *See* Section D, p. 22, *infra*.

States v. Gotchnik, 222 F.3d 506 (8th Cir. 2000) where the court determined that while modern hunting and fishing equipment can be utilized in the exercise of usufructuary rights, "modern modes of transportation to reach desired hunting and fishing areas," are not within the purview of those rights. *Id.* at 510. Davis does not even claim he was on his way to hunt, fish or trap, but instead seeks to expand his usufructuary rights to include his commute to his job as a security guard at the casino. Pet. 9-11. This is far beyond the express language of the exception to P.L. 280 criminal jurisdiction in 18 U.S.C. §1162(b).

The second P.L. 280 "exception" cited by Davis requires that any "tribal custom or ordinance. . .not inconsistent with the civil laws of the state, be given full force and effect in the determination of civil causes of action." 28 U.S.C. §1360(c), Pet. 36. Far from preempting state civil jurisdiction, the provision instead requires that in the exercise of state jurisdiction, any tribal ordinance or custom, not inconsistent with state law, be considered and applied. The Mille Lacs Band officer followed the Band's law enforcement agreement with the County Sheriff, and issued Davis a state law citation for prosecution of the traffic offenses in state court. *Davis*, 773 N.W.2d at 67. The Mille Lacs Band "ordinance or custom" is fully consistent with the state's exercise of jurisdiction over Davis. The P.L. 280 "exceptions" relied upon by Davis are either inapplicable or support the state's jurisdictional claim.

D. Public Law 280 Provides an Express Grant of Jurisdiction to the State of Minnesota for Traffic Offenses.

Although the Minnesota Supreme Court treated the traffic offenses of speeding and driving without insurance as "civil/regulatory" under its prior decision in *State v. Stone*, 572 N.W.2d at 731, that classification remains doubtful under the *Cabazon* analysis. *Cabazon* classified the California laws that prohibited the Cabazon Band from operating its bingo parlor as "civil/regulatory" because of two unique circumstances, neither of which are present here.[8] First, the Court observed that California permitted "a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery." *Id.*, 480 U.S. at 211. The Court concluded that California's policy therefore regulated, rather than prohibited, gambling in general and bingo in particular. *Id.* Second, the Court noted the policy of the federal government in encouraging tribal economic self-sufficiency, and found that gambling was the sole source of revenue for the operation of tribal government and the provision of tribal services. *Id.* at 218-19. Self-determination and economic development were dependent upon these factors. *Id. Cabazon* concluded that "the current federal policy is to promote precisely what California seeks to prevent." *Id.* at 220.

Conversely, the Court in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447

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[8] The unique tribal gaming issue in *Cabazon* was subsequently addressed by Congress through the Indian Gaming Regulatory Act, 102 Stat. 2467, 25 U.S.C. §2701 et seq. (1988)

U.S. 134, 155-159 (1980) permitted the state to tax cigarettes sold at tribal smoke shops to non-Indians, despite the negative impact this would have on tribal revenues. *Cabazon* at 219.

Justice Stevens' dissent in *Cabazon* pointed out that the majority's reasoning could be stretched to a meaningless level by "arguing that driving over sixty miles an hour is consistent with public policy because the state allows driving at speeds up to fifty-five miles per hour." 480 U.S. at 225 (Stevens, J. dissenting). The majority in *Cabazon* rejected that construction by noting that "[t]he shorthand test is whether the conduct at issue violates the State's public policy." *Id.* at 209. Minnesota's public policy prohibits speeding and driving without insurance on all public roadways.

The Minnesota Supreme Court in *State v. Stone* struggled with the issue of how to classify traffic offenses as criminal/ prohibitive or civil/regulatory. Reasoning that because Minnesota permits driving generally, offenses such as speeding and uninsured driving were civil/regulatory, the court nevertheless found that other traffic laws involving drinking and driving, or reckless and careless driving, were classified as criminal/ prohibitory. *State v. Stone*, 572 N.W.2d at 730-31. The express language of P.L. 280, with its two-part grant of jurisdiction, does not support this classification:

> "**§1162. State Jurisdiction Over Offenses Committed by or against Indians in the Indian Country.**
>
> (a) Each of the States or Territories listed in the following table [1] **shall have jurisdiction over**

> **offenses committed by or against Indians in the areas of Indian Country** listed opposite the name of the State or Territory **to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory,** and [2] **the criminal laws of such State or Territory shall have the same force and effect within such Indian Country as they have elsewhere within the State** or Territory." *Id.* [emphasis added]

Congress expressly provided in 18 U.S.C. §1162(a) that the six identified states, including Minnesota, would have jurisdiction over "offenses committed by or against Indians. . .to the same extent that such state. . . has jurisdiction over offenses committed elsewhere within the State." Additionally, and separately stated, the "criminal laws of such State or Territory shall have the same force and effect within such Indian Country as they have elsewhere within the State." *Id.*

There is nothing in this express statutory grant of jurisdiction over both offenses committed by Indians, and also extending state criminal laws to Indian Country to the same extent as elsewhere in the State, that supports the civil/regulatory classification of driving offenses by individual Indians. *Cabazon* is best understood as a case where state law operated as a direct interference with the on-reservation economic activities of tribal government.

Public Law 280 expressly provides that the state has complete jurisdiction over offenses committed by or against Indians, and the reach of the state's criminal law in Indian Country is the same as it is

everywhere else in the State. There is no exception contained in 18 U.S.C. §1162(b) or (c) that prohibits the enforcement of state traffic laws, even if the driving occurred within Indian Country. The absence of a traffic law exception in P.L. 280, while other exceptions are expressly included in 18 U.S.C. §1162, counsels against judicial creation of a traffic law exception. The enforcement of state traffic laws does not impact tribal self-determination or economic development. There is no federal or tribal interest that is promoted by permitting the violation of traffic laws. The health, safety, and welfare of Indian citizens is enhanced by the enforcement of state traffic laws in a uniform manner throughout the State of Minnesota, including Indian Country. There is nothing within the language of 18 U.S.C. §1162 that could be read to limit uniform state traffic law enforcement on state maintained highways for travel throughout Indian Country.

Driving without insurance is prohibited on all public roads in Minnesota, and exceeding the speed limit is similarly prohibited throughout Minnesota. Indeed, the ordinances of the Mille Lacs Band also prohibit driving without insurance and prohibit speeding. *Davis*, 773 N.W.2d at 74. There is no basis to classify state traffic laws as anything but criminal/prohibitive when federal law is disinterested or minimal on traffic matters, and where the State of Minnesota uniformly prohibits driving offenses on all roadways in the State. *Id.* at 72-73. Policy considerations favor uniform state traffic law jurisdiction throughout Minnesota, not a patchwork of enforcement for Indians versus other citizens. This is especially true where federal, state or county roadways

take travelers through Indian trust land parcels or reservations where the traveler intends no interaction with the tribe or its lands. To single out one class of citizens, non-member Indians, and subject them to the laws of a tribal government, when other citizens are not, raises serious Equal Protection issues. The uniform application of state traffic laws and jurisdiction under P.L. 280 avoids this outcome.

E. The Case Should be Remanded to Determine Whether the Mille Lacs Reservation Exists Before the Court Reaches the Issues Presented on the Petition for Certiorari.

The lower courts have not addressed whether the Mille Lacs Reservation of 1855 was disestablished, or whether the driving conduct occurred in Indian Country. The Petition for Writ of Certiorari should not be granted, absent a remand for determination of these issues.

The Minnesota Supreme Court assumed, without deciding, that Davis committed his offense in Indian Country because it determined that the State had jurisdiction even if Davis was in Indian Country. *Davis*, 773 N.W.2d at 68, n. 2. Petitioner argues that Davis was in Indian Country because he was within the boundaries of the Mille Lacs Reservation established by the 1855 Treaty. *See* 1855 Treaty with the Chippewa, 10 Stat. 1165, Pet. App. 69a. Petitioner's argument is fundamentally in error because this Court has already determined that there was "an express relinquishment of the lands in the Mille Lacs Reservation." *United States v. Mille Lacs Band*, 229 U.S. at 504.

This issue is important for two reasons. First, if Davis' driving conduct occurred outside of Indian Country, the state court unquestionably has jurisdiction. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). [stating if an offense is committed outside of Indian Country, the state has authority to enforce its laws against Indians.] Because the Reservation boundary issue was not addressed in the lower courts, this case is not the appropriate vehicle to address whether the state court lacks jurisdiction under *Cabazon*'s preemption analysis, in light of the "*Duro* fix" and *Lara*. The Court should decline review until a case is presented in which the issue of whether the offense occurred in Indian Country has been fully developed.

Second, Petitioner argues that it is the self-governance rights of the Minnesota Chippewa Tribe that are being impacted by the failure to find that the Mille Lacs Tribal Court has exclusive jurisdiction over driving conduct by Davis on the Mille Lacs Reservation. 773 N.W.2d at 68, 73. Obviously one of the necessary components of that argument is in serious doubt in light of this Court's holding that the Reservation was relinquished. *United States v. Mille Lacs Band*, 229 U.S. at 504. Petitioner also argues that the structure of the governance rights of the Minnesota Chippewa Tribe, in which the Mille Lacs Band is one of its constituent members, is sufficient to implicate the self-governance rights of the Minnesota Chippewa Tribe itself. 773 N.W.2d at 73-74. Once again, the existence of the Mille Lacs Reservation is essential for this claim to be advanced.

The Minnesota Chippewa Tribe, under its Constitution, is composed of five Bands with

reservations and one Band without a reservation, the "non-removal Mille Lacs Band of Chippewa Indians." *See* Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Minnesota, Preamble, Pet. App. 39a. Because of this Court's decision in 1913 in *United States v. Mille Lacs Band*, when the Constitution of the Minnesota Chippewa Tribe was written under the authority of the 1934 Indian Reorganization Act, 48 Stat. 984, the MCT Constitution recognized that the Mille Lacs Reservation no longer existed. Pet. App. 39a. What is colloquially referred to as the Mille Lacs Reservation today is a collection of trust lands acquired for the benefit of the Mille Lacs Band.[9] *See* 773 N.W.2d at 67. ["Davis argues, and we assume for purposes of this Appeal, that the area where he stopped his vehicle is land held in trust by the United States for the Mille Lacs Band of Chippewa Indians."] *Id.*

But if the Mille Lacs Reservation of 1855 no longer exists, as this Court held ninety-seven years ago, then the factual predicate of the Petitioner's argument that the Minnesota Chippewa Tribe has self-governance interests in Mr. Davis' driving activities on the Mille Lacs Reservation is missing a critical component. Tribes have some "attributes of sovereignty over their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). When the "*Duro* fix" lifted the ban on inherent tribal jurisdiction over

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[9] *County of Mille Lacs v. Benjamin*, 262 F.Supp.2d 990 (D. Minn. 2003), *aff'd in part and rev'd in part on other grounds*, 361 F.3d 460 (8th Cir. 2004), *cert. den.* 543 U.S. 956 (2004) found that subsequent to the Nelson Act, "the United States purchased land for the Mille Lacs Band. . .[t]he 4,000 acres purchased at that time are held in trust." *Id.*, 262 F.Supp.2d at 993.

all Indians, that could necessarily only apply to non-member Indians within the Tribe's "territory." The MCT Constitution itself, as well as United States Supreme Court precedent, place the claim that there is a "Mille Lacs Reservation" within the jurisdiction of the Minnesota Chippewa Tribe in serious doubt.

Mille Lacs County brought suit in an effort to determine the Mille Lacs Reservation boundary status in *County of Mille Lacs v. Benjamin*. The district court declined jurisdiction based on its finding that the plaintiffs lacked standing to bring the claims and that the claims were not ripe for adjudication. *Id.* 262 F.Supp.2d at 1001. In reaching that holding, the court stated:

> "The Mille Lacs Band has neither threatened nor demonstrated an intention to enforce its ordinances beyond its 4000 acres."

Id. at 996. The court also reviewed "the text of the Mille Lacs Band ordinances" and found that they were "insufficient to indicate an intent to enforce all of the Mille Lacs Band ordinances on the land within the 1855 boundaries." *Id.* at 996-97. "**The Mille Lacs Band and its members have consistently complied** – however grudgingly – **with** the County's zoning regulations and **state traffic laws.**" *Id.* at 997. [emphasis added] Given that the Mille Lacs Band has not asserted the reach of its ordinances beyond the four thousand acres of trust land, and has told the federal district court that its members comply with state traffic laws, in order to avoid adjudication of the reservation boundary issues in *County of Mille Lacs v. Benjamin*, the Minnesota Chippewa Tribe must be

bound by the decisions of its constituent member Band on the reach of its ordinances. The alternative, if the Court determines that the self-governance rights of the Minnesota Chippewa Tribe are implicated by the issuance of a state traffic citation to Davis, is that the Reservation boundary issue is now ripe for adjudication.

Accordingly, before this Court can resolve the issues presented by the Petition for Writ of Certiorari, this case would need to be remanded for determination of the reservation status issue, and whether the driving conduct on a state administered highway occurred within Indian Country. While the State of Minnesota believes that the Petition for Certiorari should be denied, if the Court is inclined to grant review, a remand to determine whether the 1855 Reservation still exists and whether the offense occurred within Indian Country is necessary before the issues will be fully ripe for this Court's determination.

The historical facts supporting the complete sale, cession and relinquishment of the Mille Lacs Reservation, including any claim of right of occupancy, are compelling. Just eight years after the creation of the Mille Lacs Reservation in 1855, the United States negotiated a treaty in 1863, 12 Stat. 1249, for the cession of those reservation lands. This action was part of the larger effort of the United States to cede various Chippewa Reservations in Minnesota and relocate the Chippewa Indians onto a single Reservation. *United States v. Mille Lacs Band*, 229 U.S. at 500-01. The 1864 Treaty with the Chippewa, 13 Stat. 693, "superseded [the Treaty] of 1863, and insofar as their provisions are material here they were

identical. . ." *United States v. Mille Lacs Band* at 501. The Treaty of 1864 contained a proviso in Article 12 declaring that due to their good conduct, the Mille Lacs Band of Indians would not be compelled to remove from the old reservation to the new one, as long as they do not interfere with the whites. *Id.* at 501-02, *citing* Article 12 of the Treaty of 1864. The Mille Lacs Band maintained that Article 12 operated to reserve lands for their occupancy and use indefinitely, which lands would not be open to settlement. *Id.*

In 1889, Congress passed the Nelson Act, 25 Stat. 642. The Nelson Act of 1889 authorized and obtained an agreement with the various Chippewa Bands in Minnesota, including the Mille Lacs Band, to cede their interest in several reservations in Minnesota and remove to the White Earth Reservation. *United States v. Mille Lacs Band,* 503-05. Among the provisions of the Nelson Act was the following:

> "[W]e do also hereby forever relinquish to the United States the right of occupancy on the Mille Lacs Reservation, reserved to us by the twelfth article of the treaty of May 7, 1864."

Id. at 505, quoting the Nelson Act Agreement approved and accepted by the President on March 4, 1890. *Id.* at 504.

On this record, the Court found that there had been an express relinquishment and cession of the Mille Lacs Reservation, including the right of occupancy. *United States v. Mille Lacs Band* at 504-05.

> "[T]he Indians, no less than the United States, are bound by the plain import of the language of the act and the agreement."

Id. at 508. Upon these facts, the Court concluded that there was "an express relinquishment of the lands of the Mille Lacs Reservation." *Id.* at 504.

The United States Supreme Court noted that the original Mille Lacs Reservation was comprised of "a little more than 61,000 acres." *Id.* at 499. The lands of the original Mille Lacs Reservation were disposed of in their entirety. 29,335.50 acres were disposed of prior to the Nelson Act, 31,692.34 acres were disposed of under the Nelson Act, and payments were made by the United States government on the claims. *See, Minnesota Chippewa Tribe v. United States,* 11 Cl.Ct. 221, 230 (1986). *See also, United States v. Minnesota,* 270 U.S. 181, 198 (1926) [finding that the Nelson Act ceded reservation land]; *compare South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998), *citing Decoteau v. District County Court for Tenth Judicial District,* 420 U.S. 425 (1975) [lands ceded or relinquished under an Act similar to the Nelson Act were not in the reservation], *Id.*, 522 U.S. at 791-92. After this Court's decision in *United States v. Mille Lacs Band* in 1913 found that the Reservation had been expressly ceded and relinquished, the United States purchased approximately four thousand acres of trust land parcels. *Mille Lacs County v. Benjamin,* 262 F.Supp.2d at 993.

Because the resolution of the Mille Lacs Reservation boundary issue is potentially dispositive of the issues raised on appeal, before the case is granted review under Davis' Petition for Writ of

Certiorari, this case should be remanded to the Minnesota courts for a determination of these issues. Because the Minnesota Supreme Court correctly determined that the state had subject matter jurisdiction over Davis' traffic offenses, the Petition for Writ of Certiorari is properly denied.

CONCLUSION

For the reasons stated, the Respondent State of Minnesota respectfully requests that the Petition for Writ of Certiorari be denied. In the alternative, should the Court determine that the issues merit further review, the case should be remanded to the Minnesota courts for an evidentiary hearing on the status of the Mille Lacs Reservation and whether the driving conduct in question occurred in Indian Country.

Respectfully submitted,

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