No. 10-1236

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Fond du Lac Band of Lake Superior Chippewa,

Plaintiff/Appellant,

vs.

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

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF OF APPELLEE WARD EINESS, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE MINNESOTA DEPARTMENT OF REVENUE

DENNIS J. PETERSON
Tribal Attorney
Atty. Reg. No. 0208036
Fond du Lac Band of Lake Superior Chippewa
Legal Affairs Office
1720 Big Lake Road
Cloquet, MN 55720

(218) 878-2607

ATTORNEY FOR PLAINTIFF APPELLANT

LORI SWANSON
Attorney General
State of Minnesota

RITA COYLE DEMEULES
Assistant Attorney General
Atty. Reg. No. 0191644
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 757-1429

ATTORNEYS FOR DEFENDANT - APPELLEE

SUMMARY OF THE CASE

State tax laws generally do not apply to Indians living and working on the reservation because tribal sovereignty is strongest when focused on value generated on the Reservation by resident tribe members. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 93 S.Ct. 1257 (1973). Even so, 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). Thus, the *McClanahan* Indian income tax immunity rule "does not operate outside of Indian Country." *Chickasaw Nation*, 515 U.S. at 464, 115 S.Ct. at 2223.

The District Court correctly applied these principles and denied the summary judgment motion brought by the Fond du Lac Band of Lake Superior Chippewa based on the undisputed facts showing the pertinent income was earned outside the Reservation (or Indian Country). The District Court also found there was no constitutional impediment to Minnesota's assertion of its taxing authority over out-of-state income because Reservation residents are citizens of and domiciled in Minnesota.

Defendant-Appellee agrees with the request for 20 minutes of oral argument per side.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

FEDERAL CONSTITUTION

FEDERAL STATUTES

STATE STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. The United States Supreme Court has expressly limited the *McClanahan* tax immunity rule to income earned on the reservation by a reservation resident. The Court has also routinely upheld state tax authority over off-reservation activities. Did the District Court correctly conclude that the *McClanahan* rule does not exclude Minnesota's tax on the income a Reservation resident earns outside the Reservation and outside the state?

> *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257 (1973).
>
> *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267 (1973).
>
> *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069 (1980).

2. Minnesota taxes the worldwide income of its residents, including income earned outside the state. The Band concedes that Reservation residents are Minnesota residents. Did the District Court correctly conclude that Minnesota's tax on the off-reservation income of Band members comports with the Due Process Clause?

> *Lawrence v. State Tax Comm'n of Mississippi*, 286 U.S. 276, 52 S.Ct. 556 (1932).
>
> *Luther v. Comm'r of Revenue*, 588 N.W.2d 502 (Minn.), *cert. denied*, 528 U.S. 821 (1999).

STATEMENT OF FACTS

The facts below were largely undisputed.

The two Band members mentioned in the Amended Complaint, Mr. Houle and Mr. Diver, are enrolled members of the Fond du Lac Band of Lake Superior Chippewa ("the Band"). Joint Appx. at 4-5. It was undisputed that Mr. Houle and Mr. Diver lived on the Band's Reservation when they each received the income at issue here. Joint Appx. at 14, 25 (Exh. B to Houle Aff.; Diver Aff., ¶¶ 7-8).

Further, it was undisputed that both Mr. Diver and Mr. Houle received income derived from work performed off the Reservation and outside of Minnesota. The Minnesota Department of Revenue (hereafter "the State" or "Minnesota") agreed, however, that Mr. Houle's income (military pension pay) is exempt from Minnesota's income tax. *See* Add. at 1-2; *see also* Dahlstrom Aff., ¶ 7 & Exh. A (filed Oct. 2, 2009).[1] The District Court therefore found that the legal

---

[1] The active duty military income of a reservation resident is exempt from state tax. State Taxation of Income Of Certain Native American Armed Forces Members, 2000 Westlaw 34475734 at *8-9 (Off. Legal Counsel, Nov. 22, 2000 (holding that "section 514 [of the SSCRA] prohibits the State containing the service member's reservation residence from taxing [the] . . . military compensation" earned "outside [the] reservation by virtue of . . . compliance with military orders," where tribe members claims the tribal reservation as a residence). The Legal Counsel's opinion does not address the tax status of military pension income. Generally, a state resident's pension income is subject to state tax, *see, e.g.*, Hellerstein & Hellerstein, State Taxation, ¶ 20.07[2](a) (2009) (explaining

(Footnote Continued On Next Page.)

issue presented by the Band's summary judgment motion was moot as to military pension income. Add. at 1-2.

Mr. Diver received pension payments from his union, based on his work off the reservation, between 1967 and 1997, with Yellow Freight System in Cleveland, Ohio. Joint Appx. 25 (Diver Aff., ¶¶ 5, 8). The Band challenged Minnesota's tax on Mr. Diver's pension income. *See* Add. at 2. Mr. Diver also earns and/or reports income from sources other than the Yellow Freight pension income. *See* Joint Appx. 36-43 (Diver Aff., Exh. C) (reporting income in addition to union pension income).

Based on this record, the District Court denied the Band's Motion for summary judgment, finding that the Supreme Court exempts from state tax only on-reservation income earned by a reservation resident. Since Minnesota's tax on off-Reservation income is permitted by controlling Supreme Court decisions, and

---

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). Minnesota, however, exempts military pension income received by American Indians who entered active duty military service from a reservation residence. Logically, if the Band member's military income was exempt because the member entered active duty service from a reservation residence, then the deferred compensation paid for that same military service, in the form of pension income, is also exempt as long as the taxpayer lives on the reservation. *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 can constitutionally tax the worldwide income of its residents, the district court also found there was no constitutional impediment to Minnesota's income tax.

SUMMARY OF THE ARGUMENT

This Court should affirm the considered opinion of the district court.

Minnesota taxes the worldwide 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"). Reservation residents are citizens of the state in which the reservation is located, because a reservation is generally considered part of the territory of the state in which it is located. *See Nevada v. Hicks*, 533 U.S. 353, 361, 121 S.Ct. 2304, 2311 (2001) ("Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State."); U.S. CONST., AMEND. XIV, §1 (all persons born in United States and subject to its jurisdiction are citizens of the United States and the state wherein they reside); *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"). Based on this in-state status and presence, the United States Supreme Court recognizes that reservation residents who earn income off the reservation are subject to the same tax obligations borne by state

residents who do not live on reservations. *See, e.g., 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 non-discriminatory state law otherwise applicable to all citizens of the State."). In contrast and notwithstanding this state residency status, 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 operates only within Reservation boundaries or Indian Country. *Mescalero Apache Tribe*, 411 U.S. at, 153, 93 S.Ct. at 1273.

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 by a Reservation resident — accommodates the interests of both the Band and the State while preserving their respective sovereign taxing authority. Further, an income tax on off-Reservation income earned by Minnesota residents who live on the Band's reservation is wholly consistent with due process. The District Court correctly recognized this dividing line, and properly applied the Supreme Court's jurisprudence. The Band's appeal must therefore be denied.

I. *McClanahan* Exempts From State Tax Only Income Earned By Reservation Residents That Is Derived From Reservation Sources Or Employment. A State Tax On Income Earned Off The Reservation Is Permissible.

Drawing primarily upon the Supreme Court's *McClanahan* decision, the Band argues that the companion decision in *Mescalero Apache Tribe* is "dictum as applied to the income derived by tribal members from out-of-state sources." Band Br. at 4. Further, the Band proposes that this Court declare *Mescalero Apache Tribe* limited "to activities outside Indian country and elsewhere in the State." *Id*. at 13.

The Band's proposed limitation finds no support in either *McClanahan* or *Mescalero Apache Tribe*, nor the numerous decisions that followed and upheld state tax authority on Reservation Indians or on transactions involving reservation Indians, even in the absence of any evidence of congressional consent. As explained below, the District Court correctly understood the limitations of *McClanahan*, and therefore properly denied the Band's Motion.

A. ***McClanahan* Is Routinely Recognized As A Two-Part Test That Applies Only To On-Reservation Income Earned By A Tribe Member That Resides On The Reservation**.

In *McClanahan v. Arizona Tax Comm'n*, 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. 164, 93 S.Ct. 1257 (1973). The Court began its analysis by explaining the narrow scope of the issue addressed:

> We are not dealing here with Indians who have left or never inhabited reservations set aside for their exclusive use. . . . Nor are we concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations. *Nor, finally, is this a case where the State seeks to reach activity undertaken by reservation Indians on nonreservation lands*. Rather, this case involves *the narrow question* whether the State may tax a reservation Indian for income earned exclusively on the reservation.

Id. at 167-68, 93 S.Ct. at 1260 (citations om'd, emphasis added). After reviewing the relevant Navajo Treaty, state law, and federal statutes, *id*. at 173-77, 93 S.Ct. at 1263-66, the Court discerned a collective intent to exclude state jurisdiction over a reservation Indian earning income within the Navajo Reservation. *See id*. at 179-80, 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."). Thus, the Court concluded that Arizona could not tax "reservation Indians with income derived wholly from reservation sources." *Id*. at 165, 93 S.Ct. at 1259.

The *McClanahan* Court went no farther than expressly stated, holding exempt from state tax only income earned by Reservation residents and derived "wholly" from reservation sources. The narrow scope of this decision is confirmed by the companion decision issued the same day, *Mescalero Apache Tribe v. Jones*, 411

U.S. 145, 93 S.Ct. 1267 (1973). The issue the Court faced in *Mescalero Apache Tribe* was as follows:

> The Mescalero Apache Tribe operates a ski resort in the State of New Mexico, on land located outside the boundaries of the Tribe's reservation. The State has asserted the right to impose a tax on the gross receipts of the ski resort and a use tax on certain personalty purchased out of State and used in connection with the resort. Whether paramount federal law permits these taxes to be levied is the issue presented by this case.

Id. at 146, 93 S.Ct. at 1269. The Court then reviewed the state's tax authority over "tribal activities conducted outside the reservation," which "present[s] different considerations" from those in *McClanahan* because the state's authority outside the Reservation is "more extensive." *Id*. at 148, 93 S.Ct. at 1270. As the Court explained, "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id*. at 148-49, 93 S.Ct. at 1270; *see also Id*. at 153, 93 S.Ct. at 1273 (acknowledging 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 barred a state use tax on personal property permanently affixed to reservation land. *Id*. at 157-58, 93 S.Ct. at 1275-76.

Together, *McClanahan* and *Mescalero Apache Tribe* unambiguously define the line between permissible and prohibited state tax authority over tribe members

and tribe activities: a state cannot tax income earned on a reservation or derived solely from reservation sources by a reservation resident; but, a state can tax either off-reservation income earned by a reservation resident, or on-reservation income earned by a tribe member who lives outside reservation boundaries. In other words, both elements of the *McClanahan* holding must be present to bar a state from exercising its tax authority. The accuracy of this dividing line is confirmed by the ensuing decisions that have upheld state taxes in some instances, and struck down those taxes in other instances, depending on the location of the activity and the taxpayer's reservation status.

For example, in *Bryan v. Itasca County*, the Court struck down Minnesota's personal property tax, which was imposed on a reservation resident's mobile home. 426 U.S. 373, 375, 96 S.Ct. 2102, 2104 (1976) (noting petitioner "resides in a mobile home" on the reservation). In *Moe v. The Confederated Salish And Kootenai Tribes of the Flathead Reservation*, the Court struck down Montana's personal property tax on reservation property, a state license fee imposed on a reservation resident operating a business on reservation land, and a state cigarette tax "as applied to on-reservation sales by Indians to Indians." 425 U.S. 463, 480, 96 S.Ct. 1634, 1645 (1976). And in *Washington v. Confederated Tribes of the Colville Indian Reservation*, the Court struck down a state tax imposed on vehicles owned by reservation residents and used both on and off the reservation. 447 U.S. 134,

163-64, 100 S.Ct. 2069, 2086 (1980) (acknowledging that tax may be permissible if levied only "on the use outside the reservation of Indian-owned vehicles"). In each case, the existence of both reservation residency and on-reservation property or activity was critical to the Court's decision to strike down these state taxes.

In contrast, the Supreme Court has upheld the exercise of state tax authority when one of these two elements is missing. For example, in *Confederated Tribes of the Colville Indian Reservation*, the Court upheld Washington's cigarette tax on sales made on the Reservation by an authorized tribal vendor to non-Indians and to non-member Indians. 447 U.S. at 154-60, 100 S.Ct. at 2081-85.[2] The Court has also upheld state taxes in the context of on-reservation transactions between tribal members and non-Indians. *See, e.g., Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102 & 112-13, 126 S.Ct. 676, 681 & 687-88 (2005) (upholding fuel tax on non-Indian distributors that deliver fuel to tribe-owned, on-reservation station, and acknowledging "the 'who' and the 'where' of the challenged tax have significant consequences"); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175, 109 S.Ct. 1698, 1707 (1989) (upholding state tax on non-member doing

---

[2] A "non-member" Indian may reside on the Reservation but is not a member of the Reservation's governing Tribe. *See id.* at 161, 100 S.Ct. at 2085; *see also LaRock v. Wisc. Dep't of Revenue*, 621 N.W.2d 907 (Wis. 2001) (upholding state income tax on non-member Indian living and working on reservation).

business on reservation with the Tribe, even though resulting financial burden may fall on Tribe).

Numerous state courts also recognize the mandatory quality of *McClanahan's* reservation residency and reservation income requirements. In these states, when both elements are present, a state tax is prohibited; when either element is missing, a state tax is upheld. *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), *cert. denied*, 535 U.S. 930 (2002); *Brun v. Comm'r of Revenue*, 549 N.W.2d 91, 92 (Minn. 1996) (noting that state lacks tax 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 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"); *Flat Center Farms, Inc. v. Montana*, 49 P.3d 578 (Mont. 2002) (holding state corporation license tax cannot be applied to Indian-owned corporation that conducts business entirely within reservation); *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 [non-reservation residency or income] opens the door to the state's jurisdiction to impose a state income tax"), *aff'd per curiam*, 969 P.2d 318 (Or. 1998); *Maryboy v. Utah State Tax Comm'n*, 904 P.2d 662, 666-67 (Utah 1995) (recognizing "on-reservation activity involving only tribal members is generally exempt from state law"), *cert. denied*, 517 U.S. 1220 (1996); *LaRock v. Wisc. Dep't of Revenue*, 606 N.W.2d 580, 585 (Wis. Ct. App. 1999) (discussing *McClanahan* and noting opinion limited to "when a tribal member both lives and earns a living on the reservation"), *aff'd*, 621 N.W.2d 907 (Wis. 2001).

A recent state court decision applied *McClanahan* in this fashion to uphold a state tax on an Tribe member's per capita distribution. In *Mike v. Franchise Tax Board*, the tribe member did not live on her Band's reservation when she received the per capita distribution. The California Court of Appeals surveyed the Supreme Court's Indian tax jurisprudence and concluded that *McClanahan* applies only "when three factors coalesce: descent (Indian), residence (on the reservation of the taxpayer's tribe), and derivation (income from reservation activities)." 106 Cal. Rptr.3d 139, 147 (Cal. Ct. App. 2010). The "absence of any one of these three factors can obviate the federal preemption of state taxation and numerous other cases confirm that construction." *Id.* (emphasis in original). Since "an essential ingredient for the [*McClanahan*] exemption — residence on the lands set aside for

the tribe in which she is a member and from which the income is derived — is absent," *McClanahan* did not apply. *Id*.

The consistency with which the Supreme Court and these state courts have applied the *McClanahan* rule demonstrates that the District Court correctly recognized the limits of that rule. Since reservation-source income is missing in this case, the District Court's decision should be upheld on appeal.

B. The Band Incorrectly Limits The Scope And Import Of *Mescalero Apache Tribe*.

Notwithstanding the clear line the Supreme Court drew in 1973, which it has adhered to in several decisions over the ensuing decades, the Band reads a limit into *Mescalero Apache Tribe* namely, a requirement for off-reservation, in-state income. Any discussion in the Court's opinion beyond that factual limitation is, according to the Band, dicta as applied to off-reservation, out-of-state income. To draw a distinction not relied upon by the *Mescalero Apache* Court, the Band elevates the holding in *McClanahan* holding far beyond the Court's expressly stated limits. None of these arguments are tenable, for the reasons explained below.

First, the Band argues that mere on-reservation receipt of income is sufficient to preempt state tax authority. *See* Band Br. at 7.[3] If this argument was correct, then New Mexico's gross receipts tax would have been struck down, as on-reservation residency (and therefore, on-reservation receipt) was undisputed in that case. *See Mescalero Apache Tribe*, 411 U.S. at 146, 93 S.Ct. at 1269 ("The home of the Mescalero Apache Tribe is on reservation lands . . . in New Mexico"). More importantly, the Supreme Court has refused to elevate reservation status to the controlling character urged by the Band: "[C]ourts ordinarily will not imply tax exemptions and 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." *Mescalero Apache Tribe*, 411 U.S. at 156, 93 S.Ct. at 1274; *see also Confederated*

---

[3] In some respects, this argument merely reframes the residency question; that is, where does the income recipient live, on the reservation or off the reservation? The decision the Band cites for this proposition, *Keweenaw Bay Indian Community v. Kleine*, 546 F. Supp.2d 509 (W.D. Mich. 2008) was vacated on appeal for lack of subject matter jurisdiction and is therefore unpersuasive, *see* 569 F.3d 589 (6th Cir. 2009). Even if relevant, the district court acknowledged in that case the controlling effect of *Mescalero Apache*. *See* 546 F. Supp.2d at 523 (noting that activity occurring outside of Indian Country subjects tribe member to state law otherwise applicable to all state citizens). The decision in *North American Oil Consol. v. Burnet*, 286 U.S. 417, 52 S.Ct. 613 (1932), is unhelpful because it was a case about timing: when was the income received for tax purposes. *See id. at* 420, 52 S.Ct. at 614 ("The question for decision is whether [the income received in 1917] was taxable to [taxpayer] as income of that year."). There is no dispute here as to the year in which the Band members received their income.

Tribes of the Colville Indian Reservation, 447 U.S. at 156, 100 S.Ct. at 2082 (upholding state tax on "transactions in personalty with no substantial connection to reservation lands" even though sales made by tribe member on the reservation); *see generally Mike*, 106 Cal. Rptr.3d at 147-48 (noting that post-*McClanahan* decisions "confirm the special treatment accorded to reservation Indians does not arise merely because the individual generically satisfies the descent and residence factors").

Further, if the Band's argument was correct, then income earned off the reservation anywhere — in state or out-of-state — could be transformed into exempt income merely by directing the payor to deliver payment to a reservation address. This outcome flatly contradicts the result in *Mescalero Apache Tribe*, as well as the Supreme Court's expressly stated limits in *McClanahan*. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 464, 115 S.Ct. 2214, 2223 (1995) (noting that *McClanahan* rule "does not operate outside of Indian Country").

Similarly, the Band's proposed reconciliation of *McClanahan* and *Mescalero Apache Tribe,* by limiting the latter to off-reservation, in-state income, is unnecessary and incorrect. While the taxable activity at issue in *Mescalero Apache* occurred within the state of New Mexico, the controlling factual element for the Court's holding was any "off-reservation activities." *See Mescalero Apache Tribe*, 411 U.S. at 153, 93 S.Ct. at 1273. Nothing in the Court's discussion of New Mexico's authority over off-reservation activities referred to, let alone turned on, the

in-state character of those activities, and the Band does not explain how that claimed distinction can be gleaned from the Court's holding. Indeed, the Court's decision to reject "the Tribe's broad claims of tax immunity," *see id*. at 155, 93 S.Ct. at 1274, counsels against reading such a limitation into the Court's otherwise expansive holding.

Oklahoma's arguments in *Sac And Fox Nation*, and the Supreme Court's response, suggest that the Court would reject the Band's efforts to narrow *Mescalero Apache Tribe*. In this case, Oklahoma argued 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." *Oklahoma Tax Comm'n v. Sac And Fox Nation*, 508 U.S. 114, 123, 113 S.Ct. 1985, 1990 (1993). 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 discussion of only the residency prong implies that Oklahoma correctly recognized the two necessary *McClanahan* 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").[4]

Second, the Band's treatment of *Mescalero Apache*'s holding as dicta is plainly incorrect. "Dicta" is typically understood as judicial commentary that is "unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." BLACK'S LAW DICTIONARY 1102 (8th ed. 2004). The Supreme Court's *Mescalero Apache* rule – that "Indians going beyond reservation boundaries" are subject to nondiscriminatory state law absent express federal law to the contrary – was hardly unnecessary to the Court's decision. That rule was the essential foundation for the Court's decision. Indeed, the Court rejected the "broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State was therefore prohibited from enforcing its revenue laws against any tribal enterprise[.]" *Id*. at

---

[4] Oklahoma's argument rested on the 1891 disestablishment of the Sac And Fox Nation's Reservation in Oklahoma. *See id*. at 121, 113 S.Ct. at 1989. None of the federal courts that addressed Oklahoma's argument determined whether the reservation was in fact disestablished because the broader concept of "Indian country" sufficed to satisfy the *McClanahan* residency element. *See id*. at 126, 113 S.Ct. at 1992 (noting that all tribe members "earning income from the Tribe" may live within Indian country). In other words, regardless of the status of the Sac And Fox Reservation, if the income recipient lived in Indian Country, *McClanahan* applied because the income at issue was earned from tribal sources.

147, 93 S.Ct. at 1270; *see also id*. at 155, 93 S.Ct. at 1274 (rejecting "broad claims of tax immunity"). Further, the Court's analysis was guided by its repeated references to the off-reservation nature of the pertinent activities, because "tribal activities conducted outside the reservation present different considerations" in contrast to the narrow issue addressed in *McClanahan*. *Id*. at 148, 93 S.Ct. at 1270; *see also id*. at 149-50, 93 S.Ct. at 1271 (noting New Mexico retained tax authority over Indian activities outside reservation); *Id*. at 152-53, 93 S.Ct. at 1273 (finding it unrealistic to assume Congress considered off-reservation activities as an arm of the government). These comments, when taken with the absence of any express acknowledgment of the in-state character of the pertinent activity, preclude defining the *Mescalero Apache* rule as dicta.

Moreover, even if the holding in *Mescalero Apache* could be considered dicta as applied to out-of-state income, this Court is "bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . .[the dicta] is of recent vintage and not enfeebled by any [later] statement." *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) (quotations om'd), *cert. denied*, 512 U.S. 1236 (1994). The Supreme Court's later decisions in *Wagnon*, 546 U.S. 95, 126 S.Ct. 676, and *Cotton Petroleum*, 490 U.S. 163, 109 S.Ct. 1698, confirm that the *Mescalero Apache* rule remains a vibrant element of the Court's Indian tax jurisprudence

today, even if those decisions do not specifically address out-of-state income. Both decisions upheld state tax authority even though the effects of that tax may rest on the tribe, or on reservation residents. These decisions confirm that the *Mescalero Apache* rule — off-reservation activities are subject to state law — can be applied to off-reservation, out-of-state income consistently with both *McClanahan* and *Mescalero Apache Tribe*.[5]

Finally, the decision in *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 118 S.Ct. 1700 (1998) does not limit the *Mescalero Apache* rule to off-reservation, in-state income. In *Kiowa Tribe*, the Court considered whether a tribe was immune from suit in state court when the tribe had defaulted on a contract entered into with a non-Indian. *Id.* at 754, 118 S.Ct. at 1702. In explaining *Mescalero Apache Tribe*, the *Kiowa Tribe* Court acknowledged that New Mexico's tax was permissibly imposed on "tribal activities occurring within the State but

---

[5] The Band dismisses the district court's reliance on non-income tax cases, i.e., excise tax and other tax cases, *see* Band Br. at 17-19. However, these decisions are relevant even in the absence of an income tax because they dispel the Band's categorical claim that reservation residency alone determines state tax authority over off-reservation income. Moreover, the Supreme Court relies on all Indian tax cases, regardless of the nature of the tax, which further demonstrates the relevancy of these cases. *See, e.g.*, *Cotton Petroleum Corp.,* 490 U.S. at 175, 109 S.Ct. at 1707 (relying on *Mescalero Apache Tribe* in analyzing state oil/gas tax); *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*).

outside Indian country," *id*. at 755, 118 S.Ct. at 1703. The Court then explained that the off-reservation state tax authority upheld in *Mescalero Apache Tribe* did not operate to eliminate the Kiowa Tribe's immunity from state court actions: "To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit." *Id.* Thus, to the extent there is any relevance to the description of the *Mescalero Apache Tribe* facts in the *Kiowa Tribe* decision, it is only to explain the basis for the Court's distinction between state tax authority for off-reservation activities, compared to reserved tribal immunity for off-reservation activities. Nothing in that brief reference can be understood to narrow the substantive scope of the *Mescalero Apache Tribe* holding. When state tax authority is at issue, *Mescalero Apache Tribe* controls if off-reservation activities are at issue, regardless of whether the activity is in-state or out-of-state.[6]

---

[6] The decision in *Fatt v. Utah State Tax Comm'n*, 884 P.2d 1233 (Utah 1994), which disallowed a state tax on out-of-state income, is therefore inapposite. That decision merely implements the "apparent congressional intent" to ensure reservation residents do not lose the benefit of *McClanahan*'s tax immunity principle due to compulsory military service. *See id*. at 1235 (rejecting interpretation of Soldiers' and Sailors Civil Relief Act that "would result in Fatt's bearing a burden he would not have borne had he not left the reservation to serve his country."). In contrast here, the Band's members voluntarily choose to leave the Reservation for employment. *See also* discussion, *infra* at 24.

C. A State Tax Applied To Off Reservation Activity Is Permissible Unless Congress Expressly Bars That Tax.

The Band argues that states can only tax reservation Indians when Congress has consented to that taxation. *See* Band Br. at 10. This argument overstates the need for congressional consent in the context of Indian tax immunity. In sum, congressional consent is required for state taxation only in the *McClanahan* context: when the state tax is alleged to be apply to an on-reservation activity involving a tribe member residing on the reservation. *See McClanahan,* 411 U.S. at 171, 93 S.Ct. at 1261 (recognizing that "Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred" by Congress); *see also Cabazon Band of Mission Indians*, 480 U.S. at 215 n.17, 107 S.Ct. at 1091 n.17 (noting federal consent is required "for taxing Indian reservation lands or Indian income for activities carried on within the boundaries of the reservation"). Absent the simultaneous presence of on-reservation activity and residence, a state tax is permissible unless Congress expressly prohibits that tax. *See Mescalero Apache Tribe*, 411 U.S. at 148-49, 93 S.Ct. at 1270 ("Absent express federal law to the contrary," off-reservation activities are generally subject to state tax).

Thus, in *Mescalero Apache Tribe*, the Court rejected the "Tribe's broad claims of tax immunity," 411 U.S. at 155, 93 S.Ct. at 1274, and assigned Congress

the role to "say so in plain words" if it intended off-reservation activities to be exempt from tax. *Id.* at 156, 93 S.Ct. at 1274. As Justice Rehnquist later explained, the Court in *Mescalero Apache Tribe* correctly assigned this role to Congress because "tradition did not recognize a sovereign immunity in favor of the Indians" for off-reservation activities. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. at 179, 100 S.Ct. at 2094-95 (Rehnquist, J., concurring in part, dissenting in part). "Congress could of course countermand this 'tradition' of no immunity. But it has not done so. 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." *Id.* at 185, 100 S.Ct. at 2098 (concurring in decision upholding Washington's cigarette tax on non-members' on-reservation purchases).

Indeed, absent this understanding of *Mescalero Apache Tribe* — that state taxes are permissible outside the specific *McClanahan* setting unless Congress explicitly states otherwise — the outcome in that case would have been completely different. New Mexico's gross receipts tax would have been struck down because there was no evidence of any congressional consent to a state tax on off-reservation activities. Similarly, the state taxes that were upheld in *Confederated Tribes of the Colville Indian Reservation* and in *Moe*, for on-reservation transactions involving non-Indians or non-members, would have been struck down for the same reason.

And, taxes imposed on non-Indian businesses, but whose economic incidence might fall on the Tribe, on reservation activities, or on tribe members, would have similarly been struck down. *See Wagnon*, 546 U.S. 95, 126 S.Ct. 676 (tax on non-Indian fuel distributor for fuel sold to on-reservation tribal stores permissible, even though economic incidence of tax may be borne by Tribe or its reservation residents).

In fact, *McClanahan* cannot be deemed the "express federal law to the contrary" that bars a state tax on off-reservation, out-of-state income, as the Band suggests, *see* Band Br. at 4-5, because such a conclusion eviscerates the holding in *Mescalero Apache Tribe*. That is, regardless of the in-state versus out-of-state nature of the income, the Band does not explain how the narrow scope of *McClanahan* can be applied to "Indians going beyond reservation boundaries," who are, according to the *Mescalero Apache Tribe* Court, subject to the same state laws applicable to all other state citizens. The decisions in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 112 S.Ct. 683 (1992), and *Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, do not change this conclusion. Both decisions represent a fairly standard application of *McClanahan* principles, i.e., the extent of the state's authority over reservation lands or lands reserved to Indians. *See County of Yakima*, 502 U.S. 251, 112 S.Ct. 683 (upholding ad valorem tax on allotted Indian lands patented in fee,

since Dawes Act did not restore the tax exempt status of those lands, but prohibiting excise tax on land sales because Dawes Act did not authorize that tax); *Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (prohibiting state from regulating on-reservation tribal gaming operation).

Similarly, decisions such as *Bryan* and *McClanahan* sought evidence of congressional consent because the activity at issue occurred wholly within the reservation, *and* was by or with an Indian living on the reservation. *See Bryan*, 426 U.S. at 381, 96 S.Ct. at 2107 (noting "total absence" of congressional consent for tax on "Indians or Indian property on reservations"); *McClanahan*, 411 U.S. at 179-80, 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 leave for the Federal Government and for the Indians themselves."); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, 100 S.Ct. 2578, 2586 (1980) (recognizing limits on state interests "when on-reservation conduct involving only Indians is at issue").

This distinction also explains the result in *Fatt v. Utah State Tax Comm'n*, 884 P.2d 1233 (Utah 1994), on which the Band relies. *See* Band Br. at 14. There, the tribe member argued that his off-reservation military service wages were "protected from taxation by the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. §574 app. (1988)[.]" *Id*. at 1234. As a matter of statutory construction, the Utah

Supreme Court found that section 574 "preserves the home domicile" of active duty service members. *Id.*

> While section 574 is silent as to whether members of the armed services lose the immunity from taxation which they enjoyed in their home state, we think it is a logical and necessary corollary to retaining their domicile that their tax status there remains undisturbed as well. Anything less than that does not preserve, for purposes of taxation, the status quo of persons entering the armed services. It appears that such preservation is the overriding principle in section 574. Thus, persons entering the service carry with them the same tax immunity which they previously enjoyed in their home state.

Id. at 1234-35; *see also* *State Taxation of Income Of Certain Native American Armed Forces Members*, 2000 Westlaw 34475734 at *6 (Off. Legal Counsel, Nov. 22, 2000) (concluding that "the SSCRA, especially when read in light of general principles of federal Indian law, preempts any authority a State containing a Native American's tribal residence may otherwise have to tax that Native American's military income."). Thus, section 574 was the "express federal law to the contrary" that preempted state tax on reservation residents' off-reservation, out-of-state income. Absent that express federal law, *Mescalero Apache Tribe* would have permitted the tribe member's home state to tax that off-reservation income.

Finally, while *McClanahan* may establish a presumption against taxing Indians in Indian Country on income earned on the reservation or property maintained on the reservation, there is no broad presumption against state taxation

of Indians merely because those Indians may reside in Indian Country, as the Band implies. *See* Band Br. at 11. The *Mescalero Apache Tribe* decision puts that contention to rest. If there was any doubt as to the extent of state authority over off-reservation activities, the Supreme Court recently stated that it has "taken an altogether different course . . . when a State asserts its taxing authority outside of Indian country." *Wagnon*, 546 U.S. at 112, 126 S.Ct. at 688. The presumption the Band proposes simply does not arise outside the *McClanahan* context. *See Osage Nation v. Oklahoma*, 597 F. Supp.2d 1250, 1261-62 (W.D. Okla. 2009) ("*McClanahan* never established either an exemption applying categorically to all tribal members residing in Indian country, or an exemption which applied, regardless of the source of the tribal member's income."), *aff'd on other grounds*, 597 F.3d 1117 (10th Cir. 2010).

D. A State Tax On Income Generated By Off-Reservation Activity Does Not Infringe Tribal Sovereignty.

The Band argues that a state tax on off-reservation income infringes upon tribal sovereignty, claiming that the tax diminishes the Band's tax base and interferes with the Band's right to make its own laws. Band Br. at 14-16. These arguments have already been rejected by the United States Supreme Court.

The State acknowledges that the Band holds certain 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). Further, the Band holds occupancy rights in its Reservation, as set forth in the 1854 Treaty of LaPointe. *See United States v. Thomas*, 151 U.S. 577, 584, 14 S.Ct. 426, 429 (1894). In addition, as a sovereign, the Band holds the power to determine its tribal self-government, to impose taxes, and to control internal relations. *See Nevada v. Hicks,* 533 U.S. 353, 360-61, 121 S.Ct. 2304, 2311 (describing tribal powers); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 901 (1982) (describing Indian tax authority); *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"); *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."). For example, even when a state's tax operates within the reservation, it does not interfere with tribal sovereignty if the tax is directed to off-reservation persons or activities. *See, e.g.*, *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").

However, neither the Tribe's inherent sovereignty nor its Treaty rights are 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"). While the Band may not at this time tax the off-reservation income earned by reservation residents, neither this restraint nor the future possibility that it may do so bars Minnesota's tax. *See Wagnon*, 546 U.S. at 114-15, 126 S.Ct. at 688-89 (noting the "Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues"); *Crow Tribe of Indians v. 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).

These decisions demonstrate that 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 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 to the contrary. *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, the Supreme Court's decisions approving of state taxes imposed on on-reservation activity or property, even in the face of competing tribal taxes, would appear to represent a greater infringement upon tribal sovereignty than does Minnesota's nondiscriminatory tax on the off-reservation, worldwide income of its residents. *See, e.g., Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 154-57, 100 S.Ct. at 2081-83 (rejecting Tribe argument that tribal taxes on

same transaction state seeks to tax operates to oust state tax authority, and noting that tribal sovereignty principles seek "an accommodation between the interests of the Tribe and the Federal Government, on the one hand, and those of the State, on the other.").

Well-established principles allow for concurrent taxing authority between sovereigns. Minnesota's tax is applied here to value generated by off-reservation activities. Whether or not the Band elects to tax that value, Minnesota's tax does not interfere with tribal sovereignty. See *Chickasaw Nation,* 515 U.S. at 464-66, 115 S.Ct. at 2223 (rejecting the Tribe's attempt "to block the State from exercising its ordinary prerogative to tax the income of every resident," because Tribe's sovereign interests are at their greatest only within Indian Country). The District Court correctly applied these principles in denying the Band's summary judgment motion, and the Band's appeal must therefore be denied.

II. BAND MEMBERS WHO RESIDE ON THE BAND'S RESERVATION ARE MINNESOTA CITIZENS, DOMICILED IN THE STATE. MINNESOTA CAN THEREFORE CONSTITUTIONALLY TAX THE OFF-RESERVATION INCOME EARNED BY THOSE CITIZENS.

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 off-reservation income of Reservation residents. Thus, the Band contends that a

constitutionally sufficient nexus between the state and the reservation resident is lacking, thereby prohibiting the State's tax on off-reservation income. *See* Band Br. at 20-21.

No federal court, with one exception, has recognized a due process impediment to a state income tax on off-reservation activities or income. This is because 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." *Chickasaw Nation*, 515 U.S. at 463, 115 S.Ct. at 2222. Minnesota's income tax on off-reservation income falls outside the scope of *McClanahan.* Further, Minnesota's income tax is reasonably related to the privileges and benefits it makes available to all state residents, including Band members. For these reasons, Minnesota's tax on off-reservation income comports with due process principles.

Minnesota taxes the worldwide income of its residents, unless that income is exempt. *See* Minn. Stat. § 290. 014, subd. 1 (2008) ("all net income of a resident individual is subject to tax"); *see also Luther v. Comm'r of Revenue*, 588 N.W.2d 502, 508-09 (Minn.), *cert. denied*, 528 U.S. 821 (1999); *Bolier v. Comm'r of Tax'n*, 45 N.W.2d 802, 804 (Minn. 1951) ("It is well settled that a state may constitutionally tax a resident . . . on income derived from sources outside of the state"). A tax such as Minnesota's income tax satisfies due process requirements if

there is a "minimum connection between a state and the person, property, or transaction it seeks to tax." *Quill Corp. v. North Dakota*, 504 U.S. 298, 306, 112 S.Ct. 1904, 1909 (1992). In addition, "the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Id*. at 306, 112 S.Ct. at 1910; *see also Lawrence v. State Tax Comm'n of Mississippi*, 286 U.S. 276, 280, 52 S.Ct. 556, 557 (1932) (upholding state income tax on resident's out of state income, noting states are "unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon . . . privileges enjoyed there") (cits. om'd). 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)).[7]

---

[7] The decisions the Band cites at page 20 of its brief, *Wisconsin v. J.C. Penney Co*., 311 U.S. 435, 61 S.Ct. 246 (1940); and *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Calif*., 528 U.S. 458, 120 S.Ct. 1022 (2000) are distinguishable for at least two reasons. First, the taxes at issue in those cases

(Footnote Continued On Next Page.)

The Band concedes that Reservation residents are state residents entitled to the state services available to all state residents. *See* Band Br. at 23. Further, as shown above, the off-reservation income at issue in this case is not exempt under *McClanahan*. Together, these points establish that the district court correctly rejected the Band's due process claim. As state residents, there is a sufficient connection between the State and these reservation residents, and Minnesota's tax on off-reservation activities is rationally related to the state services available to Band members. Thus, the worldwide income of reservation residents, except for that income earned on the reservation or from reservation sources, is subject to Minnesota's tax, as it is for all Minnesota citizens. *See Mescalero Apache Tribe*, 411 U.S. at 148-49, 93 S.Ct. at 1270 (tribe members going beyond the reservation are "subject to nondiscriminatory state law otherwise applicable to all citizens of the State.").

---

involved unitary versus nonunitary income for multi-national corporations that were not domiciled in the taxing state. The Band concedes that reservation residents are domiciled in Minnesota, thus diminishing the relevance of cases addressing non-domiciled entities. Second, the parties in *Hunt-Wesson* conceded "that the relevant income . . . bears no rational relationship or nexus to California." 528 U.S. at 464, 120 S.Ct. at 1026. There is no such concession here because the Band members are Minnesota citizens, a domicile relationship that establishes a sufficient nexus to support the State's tax jurisdiction.

Indeed, the decisions that uphold state tax and regulatory authority over on-reservation activities present far more of a potential due process incursion than does Minnesota's income tax on off-reservation income. Many of the same arguments that the Band makes here, such as the alleged need for a nexus between the state and the value (income) taxed, are equally applicable in those cases in which state tax authority for on-reservation activities was upheld. Surely, if the application of state law to *on-reservation* activities does not present a due process violation, Minnesota's income tax on the off-reservation income earned by a state resident cannot do so. *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 Tax'n 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).

Thus, the Band's due process challenges rests largely 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). For several reasons, however, the Wisconsin District Court erred in finding Wisconsin's income tax on off-reservation income violated due process concerns.

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. As shown above, the Supreme Court has rejected that focus. If reservation residency was the only test (for tax authority or for a due process challenge), then New Mexico's tax in *Mescalero Apache Tribe* would not have survived. Nor can the Band's right to consent to a tribe member's reservation residency oust a state's tax authority over off-reservation income. Even with that consent and residency, the Tribe member remains a state citizen, domiciled within the state. *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).[8] In addition, the *Zeuske* court failed to evaluate the state's nexus with the tribe member in his status as a state citizen domiciled within the state, under the principles in *Quill Corp*., 504 U.S. at 306, 112 S.Ct. at 1909 (nexus exists between "a state and the person, property, or transaction it seeks to tax."). Surely if a state has a sufficient nexus to tax the out-of-state income earned by a taxpayer who voluntarily leaves the state for employment, the state has the authority to tax the out-of-state income of a reservation resident who voluntarily leaves the reservation, and the state, for employment. *See, e.g., Lawrence*, 286 U.S. at 281, 52 S.Ct. at 557 (noting that tax is permissible when imposed on state's "own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on.").

---

[8] 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.

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, cannot be reconciled with the Supreme Court's decision, in *Mescalero Apache Tribe*, that congressional consent is unnecessary for a state to exercise its tax authority over off-reservation activities. *See Mescalero*, 411 U.S. at 148, 93 S.Ct. at 1270 ("Absent federal law to the contrary," state has authority to tax off-reservation activities). This fundamental flaw in the *Zeuske* court's analysis deprives its decision of any persuasive value.

As long as the income subject to tax is not derived from Reservation employment or sources, the State's exercise of its ordinary taxing prerogative, including with respect to off-reservation income, is constitutionally 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"). Indeed, it is because a reservation resident is domiciled in the state that the exemption afforded by *McClanahan* is critical. Without the benefit of that exemption, a reservation resident's income is subject to the same non-discriminatory tax laws applicable to all state residents.

Further, a reservation resident's status as a state citizen, subject to state laws off the reservation, does not change based on the in-state versus out-of-state source of the resident's *income,* as the Band suggests. *See* Band Br. at 26. That is, the State does not need to "confer the privileges of residency" on Band members to exercise its tax authority. The Band already concedes that reservation residents are also state residents, and presumably, the Band concedes that the State has conferred "the privileges of residency" on those reservation residents when the state taxes off-reservation, in-state income. The Band does not explain how or why that conferred residency changes simply based on the in-state versus out-of-state character of taxable income.

The only relevant distinction the Supreme Court has recognized for a reservation resident, as shown above, is on-reservation versus off-reservation income. This is a logical distinction because a reservation resident is always domiciled in Minnesota, e.g., is always a state resident. That status does not depend on the location of the reservation resident's off-reservation income (in-state vs. out-of-state). The only element that changes with off-reservation income is the permissibility of the State's tax authority. *Compare McClanahan*, 411 U.S. at 179-80, 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 or statutes leave for the Federal Government and for the Indians

themselves."), *to Mescalero Apache Tribe*, 411 U.S. at 148-49, 93 S.Ct. at 1270 ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state.")

Last, the canons of construction on which the Band relies, see Band Br. at 30-32, do not change the outcome of this appeal. First, since the *McClanahan* rule does not operate outside of Indian country, *see Chickasaw Nation*, 515 U.S. at 463, 115 S.Ct. at 2222, the Supreme Court uses the general tax principle that tax exemptions are not granted by implication. *Mescalero Apache Tribe*, 411 U.S. at 156, 93 S.Ct. at 1274. Second, as the Band concedes, the Treaty of LaPointe is silent on the possibility of state tax authority for off-reservation activities. The absence of any reference to this possibility diminishes the utility of that Treaty in resolving the legal issue before the Court. *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."); *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 156, 100 S.Ct. at 2082 (noting limited value of Washington Enabling Act in construing tax authority over non-members and transactions "with no substantial connection to reservation lands").

In sum, well-established law deems Minnesota's tax on the out-of-state income earned by state residents to be constitutionally permissible. The Band's due process challenge to that tax were therefore correctly rejected, and the District Court's opinion should be affirmed.

CONCLUSION

For the reasons stated above, the Appellee Ward Einess urges this Court to affirm in all respects the considered decision and judgment of the district court denying the summary judgment motion of the Appellant, Fond du Lac Band of Lake Superior Chippewa.

Dated: April 13, 2010 .

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota

s/Rita Coyle DeMeules
RITA COYLE DEMEULES
Assistant Attorney General
Atty. Reg. No. 0191644
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 757-1429

ATTORNEYS FOR APPELLEE

WARD EINESS, IN HIS CAPACITY AS COMMISSIONER OF REVENUE, MINNESOTA DEPARTMENT OF REVENUE

CERTIFICATE OF COMPLIANCE
WITH FRAP 32(a)(7)(B) AND
8th Cir. R. 28A(c)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,894 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 pt Times New Roman font.

Dated: April 13, 2010

LORI SWANSON
Attorney General
State of Minnesota

s/ Rita Coyle DeMeules
RITA COYLE DEMEULES
Assistant Attorney General
Atty. Reg. No. 0191644

445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 757-1429

ATTORNEYS FOR RESPONDENT
WARD EINESS IN HIS CAPACITY AS
THE COMMISSIONER OF REVENUE

CERTIFICATE OF COMPLIANCE
WITH 8th Cir. R. 28A(d)

The undersigned, on behalf of the party filing and serving this brief, certifies that each computer diskette to be filed and served, containing the full text of the brief, has been scanned for viruses and that it is virus-free.

Dated: April 13, 2010

LORI SWANSON
Attorney General
State of Minnesota

s/ Rita Coyle DeMeules
RITA COYLE DEMEULES
Assistant Attorney General
Atty. Reg. No. 0191644

445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 757-1429

ATTORNEYS FOR RESPONDENT
WARD EINESS IN HIS CAPACITY AS
THE COMMISSIONER OF REVENUE

AG: #2619887-v1