IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NEW MEXICO TAXATION AND
REVENUE DEPARTMENT,

Defendant – Appellant,

Court of Appeals No. A-1-CA-38577
Administrative Case No. 19.04-071A
AHO D&O #19-28

v.

JENNIFER SKEET,
Petitioner-Appellee.

ANSWER BRIEF OF PETITIONER-APPELLEE JENNIFER SKEET

Petitioner -Appellee Requests Oral Argument

Appeal of Decision of Hearing Officer

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STATEMENT OF COMPLIANCE WITH RULE 12-318(F) NMRA

The body of the Answer Brief of Petitioner-Appellee does not exceed the 35 page limit set forth in Rule 12-318(F)(3) NMRA. As required by Rule 12-318(G) NMRA, the Answer Brief contains, 7465 words, which is less than the 11,000 word maximum permitted by Rule 12-318(F)(3). This Answer Brief was prepared using Microsoft Word 2010, and word count was obtained from that program.

/s/ Jeanette Wolfley

REQUEST FOR ORAL ARGUMENT

Petitioner Jennifer Skeet requests oral argument in this matter as it is a case of first impression. There is no case law construing NMSA 1978, § 2-7.5.5, the State's tax exemption statute for tribal members who earn their income on reservation while living on reservation.

STANDARD OF REVIEW

Whether the Department can impose a tax on an enrolled member of the Navajo Nation who earned her income on the reservation while living on the reservation involves the interpretation and application of the state taxation exemption law, NMSA 1978, § 2-7-5.5, a question of law that is reviewed *de novo*. *Hovet v. Allstate Ins. Co.*, 2004–NMSC–010, ¶ 10, 135 N.M. 397, 89 P.3d 69; *City of Eunice v. State of New Mexico Taxation and Revenue Dept.*, 2014-NMCA-085, ¶ 8, 331 P.3d 986.

An appellate court may only reverse an Administrative Hearing Officer's decision if the decision is "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with the law." NMSA 1978, § 7-1-25(C) (2015); *Stockton v. N.M. Taxation & Revenue Dep't*, 2007-NMCA-071, ¶ 8, 141 N.M. 860, 161 P.3d 905; *Kewanee Indus., Inc. v. Reese,* 114 N.M. 784, 786, 845 P.2d 1238, 1240 (1993).

Though a court's review is de novo, "we give some deference to the hearing officer's reasonable interpretation and application of the statute." *Jicarilla Apache Nation v. Rodarte,* 2004–NMSC– 035, ¶ 25, 136 N.M. 630, 103 P.3d 554.

STATEMENT OF RELEVANT FACTS

The Navajo Nation Reservation was established by the Treaty with the Navaho, June 1, 1868, 15 Stat. 667, and is located within the present-day boundaries of the states of New Mexico, Arizona and Utah. The capital of the Navajo Nation is located in Window Rock, Arizona. Petitioner-Appellee Jennifer Skeet ("Petitioner"), an enrolled member of the Navajo Nation [TR 34:26], worked for the Navajo Nation where she served as Legislative Counsel to the Navajo Nation Labor Commission in Window Rock [TR 10:40; 11:24]. While she worked on the Reservation Petitioner lived in a home she rented in Fort Defiance, Arizona [TR 13:10], located approximately 7 miles north of Window Rock and within the boundaries of the Reservation. In 2012, Petitioner owned a home in Albuquerque, New Mexico [TR 15:55], and family ranch at Baahaali ("Bread Springs"), New Mexico, also located on the Reservation [TR 47:22]. Petitioner spent time in Albuquerque or her family ranch during the weekends when she was not working [TR 15:55, 47:22].

SUMMARY OF ARGUMENT

This case involves the application of the state's income tax exemption law, NMSA 1978, Section 2-7-5.5, to an enrolled member of the Navajo Tribe, Petitioner, who lived and worked on the Navajo Reservation. The case, is indistinguishable in all respects from *McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164 (1973), and it should be resolved by the same standards.

The law is well-established that Indian tribes and individual Indians on the reservation are exempt from state law, including state tax laws, absent unmistakably clear expression of Congressional intent to apply the state law to Indians or tribes. The inapplicability of state law to Indians on the reservation has been the rule since earliest days of the Republic. The rule is founded on the principles of inherent tribal sovereignty and the broad and exclusive federal authority over Indian affairs.

The New Mexico Legislature adopted these basic federal law principles in enacting NMSA 1978, Section 2-7-5.5 to exempt the income earned by an Indian while living on reservation. The Legislature has spoken - plainly, clearly, and concisely in the law. Notwithstanding this clear legislative mandate, the New Mexico Taxation and Revenue Department ("Department") ignores the statutory language, instead seeking to alter the exemption by adding a requirement that an Indian has to be a "domicile" of the reservation not only "living" on the

reservation. The Department's position is incorrect for several reasons. First, it violates the "plain meaning" rule (and other statutory rules) that where statutory language is clear and unambiguous, as here, the courts refrain from further statutory interpretation. Second, the Department has no authority granted by the Legislature to circumvent the statutory scheme established by the law. Third, the Department misinterprets the two Supreme Court cases upon which it relies to alter the meaning and intent of Section 2-7-5.5. Finally, its position is fundamentally inconsistent with the federal law governing taxation of Indians. In sum, the Department has failed to demonstrate any principled basis for limiting the tax exemption provided by the Legislature.

The Administrative Hearing Officer ("Hearing Officer") correctly applied standards established by this court, the United States Supreme Court, and interpreted the plain language of NMSA 1978 Section 7-2-5.5 to find that Petitioner was exempt from income taxes as the state law provides. The administrative decision should be affirmed.

We begin by describing the federal law principles of taxation relating to tribes and Indians and why they are applicable here. We then turn to the legal and logical deficiencies of the Department's contentions.

ARGUMENT

I. INHERENT TRIBAL SOVEREIGNTY AND THE FEDERAL GOVERNMENT'S PARAMOUNT AUTHORITY OVER INDIAN AFFAIRS PRECLUDE APPLICATION OF STATE INCOME TAX LAWS

A. The Principle that State law Generally Does Not Apply to Indian Tribes or to Indians on The Reservation is Firmly Established in Federal Law

From the first days of the Republic, the rule has been that state law does not apply to Indian tribes and Indians on Indian reservations. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). The laws of the state "can have no force" within tribal territory, *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 561 (1832), unless Congress has expressly conferred that authority in unmistakably clear terms. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 764-65 (1985).

The first policy is embodied in the Constitution itself, which grants Congress alone the power "[t]o regulate Commerce * * * with the Indian Tribes," just as it confers on Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. Art. I, § 8, Cl. 3. As the Supreme Court held in 1832, and as has been repeatedly reaffirmed since then, the Indian Commerce Clause vests the federal government with exclusive authority over Indian affairs. Chief Justice Marshall's landmark opinion in *Worcester*, *supra*, 31

U.S. 515, holding that a non-Indian, residing on Indian lands within a state, was not subject to state law established this principle. Writing for the Court, the Chief Justice explained that the Constitution, federal laws and treaties "provide[] that all intercourse" with the Indians "shall be carried on exclusively by the Government of the Union" and shall be "separated from . . . the States." 31 U.S. 557.

Thus, *Worcester* holds that Indian tribes retain their "right of self-government," 31 U.S. at 556, and that Indian nations are distinct political communities having territorial boundaries, within which their authority is exclusive." *Id.* at 557 (emphasis supplied). The Court concluded that state laws which purport to regulate conduct of non-Indians in Indian country "interfere[d] forcibly with the relations established between the United States and the [tribe], the regulation of which, according to the settled principles of the Constitution, are committed exclusively to the government of the Union." *Id.* at 561.

More recently, the Supreme Court again recognized that the Indian Commerce Clause is "a shield to protect Indian tribes from state and local interference" *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153-154 (1982). Accordingly, Indian nations are distinct political communities which possess exclusive authority within the exterior boundaries of their territory. *Worcester v. Georgia, supra.* As long as the tribal government remains intact and recognized by the United States government as existing, a tribe is "distinct from others" separate

from the jurisdiction of the state and to be governed exclusively by the government of the United States. *The Kansas Indians,* 5 Wall. 737, 755 (1867).

To be sure, the rule of *Worcester* has been modified over the years to permit the application of state law in some circumstances "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized," *Williams v. Lee*, 358 U.S. 217, 219-220 (1959), or where the state taxable activity took place off-reservation. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973).[1] But at the same time, the Court has stressed that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain Apache Tribe v. Bracker* 448 U.S. 142, 144 (1983).

Although *Worcester* specifically concerned the extension of state criminal jurisdiction onto Indian lands, "the rationale of the case plainly extended to state taxation within the reservation as well." *McClanahan supra* 411 U.S. at 169.

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[1] Thus, where a State seeks to regulate the conduct of non-Indians on a reservation, the Court has engaged in a more particularized inquiry into the nature of the state, federal, and tribal interests at stake, in order to determine whether the exercise of state authority is preempted by federal law or would impermissibly infringe "on the right of reservation Indians to make their own laws and be ruled by them" *White Mountain Apache Tribe v. Bracker*, *supra* 448 U.S. at 145, quoting *Williams v. Lee*, 358 U.S. at 220. See also *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 837-838 (1982).

Indeed, exemption from taxation has long been regarded as one of the principal features of the distinct character of Indian tribes within their own territory. This principle too is reflected in the Constitution, which excludes "Indians not taxed" from the enumeration upon which the apportionment of Representatives and direct taxes is based. U.S. Const. Art. I, § 2, Cl. 3; *id.* Amend. XIV.

The Court has never wavered from the teachings regarding state taxation of Indian lands, Indian tribes, and Indian individuals. See, *e.g., The Kansas Indians,* 5 Wall. 737, 755 (1867); *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 602-603 (1943); *McClanahan v. Arizona Tax Comm'n.*, 411 U.S. at 169. Nor has Congress abandoned the general rule of exemption from state taxation, even where it has otherwise consented to the exercise of state jurisdiction. See, *e.g.*, 28 U.S.C. 1360(b) discussed in *Bryan v. Itasca County*, 426 U.S. at 378, 390-392.[2]

Consistent with these principles, the Enabling Act under which New Mexico was admitted to the Union required the State to "disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian Tribe' . . . which "shall remain under the absolute jurisdiction and control of the Congress of the United States." Enabling Act of June 20, 1910, 36 Stat. 557, chapter 310. The Enabling Act further

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[2] In *Bryan*, the state of Minnesota assumed civil jurisdiction pursuant to Public Law 280, 18 U.S.C. § 1162, 25 U.S.C. §§1321-26, and attempted to impose property taxes on reservation mobile homes. The Supreme Court ruled that Public Law 280 did not authorize any new taxing jurisdiction in Indian country.

provided that "no taxes shall be imposed by the State upon lands or property therein [within the reservation]." *Id.* at 559. The New Mexico Constitution adopted these requirements in their entirety as Article XXI. N.M. Const. art. XXI. *Cf. McClanahan*, *supra* 411 U.S. at 175-176 discussing Arizona's Enabling Act.

B. Congress Has Not Authorized State Taxation of Tribal Member Income In Clear Unmistakable Terms

"In the special area of state taxation of Indian tribes and tribal members, [the Court] ha[s] adopted a *per se* rule," *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 215 n. 17 (1987). Under the per se rule, which is "rooted in the unique trust relationship between the United States and the Indians," *Montana v. Blackfeet Tribe,* supra 471 U.S. at 766 (quoting *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985), a court must "declin[e] to find that Congress has authorized state taxation unless it has 'made its intention to do so *unmistakably clear.*' " *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation,* 502 U.S. 251, 258 (1992) (quoting *Blackfeet Tribe,* 471 U.S. at 765) (emphasis added). *Accord, Hunt v. O'Cheskey*, 1973-NMCA-026, 85 N.M. 381, 512 P.2d 954 ("the Federal government's long standing policy has been that of affirmative Congressional action before permitting State action.") (denying New Mexico state income tax on Pueblo of Laguna members who were reservation residents).

The 1973 seminal case of *McClanahan, supra*, and *Hunt v. O'Chesky, supra,* lay to rest any doubt in this respect by holding that such 'taxation is not permissible absent congressional consent." See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-476 (1976); *Bryan v. Itasca County*, 426 U.S. at 375-378, 392-393.

The Department has failed to identify any Congressional authorization to impose the income tax on Petitioner's reservation employment activities. Indeed, the Department totally ignores these fundamental federal principles, and the state taxation exemption law which codifies them. On the other hand, the Hearing Officer correctly found that no act of Congress expressly authorizes New Mexico's income taxation of Petitioner's work activities on the Navajo reservation.

C. *McClanahan* and *Hunt* Are the Guiding Cases Here

As noted by the Hearing Officer, the landmark Supreme Court decision, in *McClanahan*, establishes the guidelines for this case. *McClanahan* and its progeny authoritatively define the limits of a state's power to tax reservation Indian income – the reservation boundary. *See Cabazon,* 480 U.S. at 215 n.17. In so doing, the Court emphasized that the question before it was a narrow one: "whether the State may tax a *reservation Indian* for income earned exclusively on the reservation." *McClanahan, supra,* 410 U.S at 168 (emphasis added). The *per se* test laid down

in *McClanahan* and the cases which succeeded it, provides a "bright line" between the rights of the state and of the tribe.

Rosalind McClanahan, of *McClanahan,* was an enrolled member of the Navajo tribe who lived on the Navajo reservation. She performed the employment activities that generated her income within the exterior boundaries of the Navajo reservation in Arizona. *McClanahan,* 410 U.S. 164, 165-66. The Court held that the imposition of state income taxes on Mrs. McClanahan infringed on the right of the Navajo people to make their own laws and be ruled by them. *McClanahan,* 410 U.S. at 179. Likewise, New Mexico's imposition of an income tax on Petitioner violates tribal sovereignty. Absent an act of Congress expressly allowing such taxes they are unlawful.

Petitioner is an enrolled member of the Navajo Tribe who was raised on the Navajo Reservation in Baahaali (Bread Springs), a tribal community located approximately 15 miles south of Gallup, New Mexico. In 1990, she began working for the Navajo Tribe in an office located in Shiprock, New Mexico on the Navajo Reservation. In 1998 she transferred to another Tribal office located in Window Rock, Arizona, again, located on the Navajo Reservation. While working at Window Rock, she lived in Fort Defiance in a home she rented from Lorene Ferguson within the exterior boundaries of the Navajo reservation. Petitioner estimated she spent 70% of her time during the year on reservation. At all times

during the 2012 tax year in question Petitioner performed employment activities solely for the Navajo Tribal government as Legislative Counsel on the Navajo reservation. During the weekends, when she was not working, she would stay with her partner Tom Teagarden in Albuquerque or she would stay at her family home in Bread Springs.

McClanahan soundly rejected Arizona's assertion of jurisdiction over Rosalind McClanahan's individual income, just as it would taxation of tribal land itself:

> Nor is the State's attempted distinction between taxes on land and on income availing. Indeed, it is somewhat surprising that the State adheres to this distinction in light of our decision in Warren Trading Post Co. v. Arizona Tax Comm'n, supra, wherein we invalidated an *income* tax which Arizona had attempted to impose within the Navajo Reservation. *However relevant the land-income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the State is totally lacking in jurisdiction over both the people and the lands it seeks to tax. In such a situation, the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself.*

411 U.S. at 180 (emphasis in original). This case is indistinguishable from *McClanahan.*

In the same year the U.S. Supreme Court decided *McClanahan*, this Court decided *Hunt v. McCleskey*, 1973-NMCA-026, 85 N.M. 381, 512 P.2d 954. As in *McClanahan,* this Court denied the imposition of the state income tax on tribal members. The case involved Emmett and Mary Hunt who were members of the Pueblo of Laguna. They lived on the lands of the Pueblo within the boundaries of

the Pueblo and earned income from the Laguna Pueblo government and private contracts. The Department sought to impose a gross receipts and income tax on their income. 85 N.M. at 382. The salary of Emmett Hunt was earned as director of the Pueblo of Laguna Neighborhood Youth Corps, a program sponsored by the Pueblo pursuant to a contract with the United States Department of Labor. *Id.*

This Court applied the federal law principles of tribal self-government and being free from state interference unless Congress clearly authorizes state jurisdiction. The Court stated, "Neither Congress nor the Pueblo has surrendered jurisdiction to the State of New Mexico. The Pueblo is self-governing subject only to the authority of Congress." *Id.* at 385. It added, "[b]ut there can be no doubt that the imposition of an income tax does interfere with the internal self-government of the tribe." *Id.* at 386. Finally, the Court recognized the state had not assumed any civil or criminal jurisdiction over reservations, including taxing authority. *Id.* 'To the extent that Indians and Indian property within an Indian reservation are not subject to State laws, they are not subject to State tax Laws.' *Id.* at 387, *citing* F. Cohen, Handbook of Federal Indian Law 254 (1970). *Hunt* is controlling here.

D. The Imposition of the State Income Tax is Barred by the Navajo Treaty of 1868 and Would Interfere with Tribal Self-Government

1. The Navajo Treaty of 1868

McClanahan directs "[t]he beginning of the analysis must be with the treaty which the United States Government entered with the Navajo Tribe." *McClanahan,* 411 U.S. at 173–74. The Department again fails to address this significant federal law, the Treaty, that bars state tax law. The Hearing Officer, however, reasonably considered the Navajo Treaty of 1868.

In *McClanahan,* the Supreme Court construed the treaty between the United States and the Navajo Nation in 1868, Treaty with the Navaho, June 1, 1868, 15 Stat. 667 ("Treaty"), the same Treaty here. In return for their promise to keep peace the Treaty set aside land for the use and occupation of the Navajo Tribe, a portion of what had been their original lands. 15 Stat. 667, 668. The Treaty provides --

> no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employ[ee]s of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

McClanahan, supra 411 U.S. 164, 174. The Court noted that this language did not constitute an explicit statement that the Navajos were to be exempt from state law or state taxes. Nevertheless, applying the general canons of construction rule that "[d]oubtful expressions are to be resolved in favor of" the Indians, *Id.* (alteration in original) *Id., citing Carpenter v. Shaw,* 280 U.S. 363, 367 (1930), accord

Jicarilla Apache Tribe v. New Mexico, 742 F.Supp. 1487, 1488 (D. N.M. 1990) , the Court concluded that the state was barred from imposing its income tax upon the Navajo members on income derived from employment on tribal lands.

It was the unanimous view of the Court that the Treaty "established the lands as within the exclusive sovereignty of the Navajos under general federal supervision." *McClanahan,* 411 U.S. at 174-75. This is the same interpretation that was made to preclude the imposition of a state tax law on the Navajo reservation. See *Warren Trading Post Co. v. Arizona Tax Comm.*, 380 U.S. 685, 687, 690 (1965).

The courts have, wisely and long, recognized that tribal self-government means nothing if not the power to govern its own members' activities while on the reservation, secure from interference from the states. Here too, the state has no jurisdiction to reach income generated on the reservation because it lacks jurisdiction over members of the Navajo Tribe on the Navajo reservation. *McClanahan,* 411 U.S. at 818. As in *McClanahan*, the Treaty of 1868 bars the New Mexico tax.

2. The Navajo Tribe's Interest in Self-Government Bars the State from Imposing an Income Tax

In addition to the immunity from the state income tax, the Petitioner as a Navajo Tribal member who lived and worked within the Navajo reservation and

employed solely by the Tribe itself also has a measure of immunity drawn from "the right of reservation Indians to make their own laws and be ruled by them," *e.g., White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980) (quoting *Williams v. Lee,* 358 U.S. 217, 220 (1959)). In our view, the circumstances of this case demonstrate that the challenged tax, improperly infringes on the Navajo Nation's interest in self-government.

It should be very clear that the transactions attempting to be taxed by the Department arise on Tribal lands. When a person is employed, and work is done within Navajo lands, and those actions are taxed by the State, then Tribal self-government is infringed by the State.

It is undisputed that the income in question is paid by the Navajo Tribe to Petitioner as compensation for personal services rendered to the Tribe. Moreover, the record shows that all of the income is received in return for services rendered at the Tribal headquarters in Window Rock, Arizona on the Tribe's reservation. Hence, the state tax directly burdens the administration of the Tribe by increasing the cost of administering tribal affairs, in areas subject to its jurisdiction. That result is particularly problematic in light of the express protection in the Treaty of 1868 for the continuing use of that land by the Tribe as a whole. Application of the state income tax to tribal member Petitioner in this case therefore infringes on the right of reservation Indians to make their own laws and be ruled by them to the

extent it burdens the Tribe's sovereign right to establish relationships with tribal officers and employees on reservation land without state interference.

Petitioner works and earns income in Indian Country at a job which would not exist but for the daily involvement and participation of the Navajo Nation, and the reservation economy. Going off-reservation on the weekend does not mean that the value of her labor was generated off-reservation. If income which is earned from activity carried out in Indian Country is taxable, the effects on a tribe's ability to self-govern would be disastrous. Likewise, the inability to freely tax personal property owned by members and non-members living on the reservation would have detrimental effects upon tribal governments. Tribal governments would not have a sufficient tax base to be able to effectively serve people living within their jurisdictions, and would be doomed to depend upon federal authorities to provide services to members.

The power of taxation is used for many other purposes than simply raising revenue. It is also used to encourage or discourage certain conduct, or to regulate certain conduct. Ultimately allowing unilateral assumption of the authority to tax and regulate activity, conduct, and property on reservation means that the Navajo Nation's federally protected right to self-government is defeasible by the State, or can only be exercised at the sufferance of the State. Such a result is clearly contrary to both the letter of the Constitution, treaties, and statutes, and the current

policies of Congress. *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845, 852 (1985).

The bedrock federal principles of inherent tribal sovereignty and the federal government's paramount authority over Indian affairs preclude application of the state income tax in this case. The Hearing Officer adopted these principles in reviewing the Petitioner's matter and correctly applied the exemption provided by the Legislature. The Department concedes that the well-established federal rules of law apply here. However, in seeking to apply its unusual interpretation of Section 2-7-5.5 it runs head on into the state law bar upheld in decisions extending from *Worcester* to *McClanahan* and *Hunt.*

II. THE HEARING OFFICER CORRECTLY READ SECTION 2-7-5.5 AND HELD THAT THE WORD "DOMICILE" IS NOT PART OF IT

A. The Plain Language of Section 2-7-5.5 Does Not Include the Word "Domicile"

When interpreting a statute, the courts begin with the plain language.

> In construing a statute, our charge is to determine and give effect to the Legislature's intent. In discerning the Legislature's intent, we are aided by classic canons of statutory construction, and we look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended.

Marbob Energy Corp. v. N.M. Oil Conservation Comm'n, 2009–NMSC–013, ¶ 9, 146 N.M. 24, 28, 206 P.3d 135, 139 (alteration, internal quotation marks, and

citation omitted). "We will not depart from the plain wording of a statute, unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions." *Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998–NMSC–020, ¶ 28, 125 N.M. 401, 962 P.2d 1236.

In 1978, following the federal law principles and the *McClanahan* and *Hunt* decisions discussed above, the State Legislature responded and enacted a law exempting from its taxing scheme income earned by tribal members. NMSA 1978, § 2-7-5.5 reads –

> Income earned by a member of a New Mexico federally recognized Indian nation, tribe, band or pueblo, his spouse or dependent, who is a member of a New Mexico federally recognized Indian nation, tribe, band or pueblo, is exempt from state income tax if the income is earned from work performed within and the member, spouse or dependent *lives within the boundaries of the Indian member's* or the spouse's reservation or pueblo grant or within the boundaries of lands held in trust by the United States for the benefit of the member or spouse or his nation, tribe, band or pueblo, subject to restriction against alienation imposed by the United States.

NMSA 1978, § 2-7-5.5 (1995) (emphasis added).

As directed by this Court, if the statutory language is clear and unambiguous, the court need merely apply the statute without engaging in any statutory construction. See *City of Eunice v. State of New Mexico Taxation and Revenue Dept.*, 2014-NMC-085, 331 P.3d 986 (2014). The language of Section 2-7-5.5 plainly provides an exemption to: (1) members of New Mexico Indian tribes,

(2) who earn income on a reservation, and (3) who live within the boundaries of the member's reservation. The Department contends the word "lives" in the statute must be read to also include the word "domicile." The Department does not contend the statute is ambiguous nor offer any valid reason for its novel interpretation other than the law has changed. This proposed alternative has no apparent purpose except to extinguish the exemption.

A plain reading of the statutory language demonstrates that the Legislature did not require tribal members live and be a domicile of a reservation to be exempt from state income taxes. The meaning of "live" is simple and unambiguous. In the absence of a statutory definition, "we rely on a dictionary definition to determine the meaning of the language used." *City of Eunice v. State of New Mexico Taxation and Revenue Dept., supra* 331 P.3d 986 (2014). Merriam-Webster's dictionary provides "live" as synonymous with "abide, dwell, settle, occupy, lodge, inhabit, stay." *Merriam-Webster's Dictionary,* https://www.merriam-webster.com/dictionary/live. Accessed July 30, 2020. Given this plain meaning of "live" there was no valid reason for the Hearing Officer to alter or modify the statutory language and require the word "domicile" be added as argued by the Department.

Even if the language were determined to be ambiguous, the Department's claim would fail under other statutory construction rules applicable here. First,

statutory construction is a question of law. *State v. Romero,* 2006–NMSC–039, ¶ 6, 140 N.M. 299, 142 P.3d 887. As such, "the court is not bound by the agency's interpretation [of its own statute] and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law." *Morningstar Water Users Ass'n v. New Mexico Pub. Utility Comm'n,* 1995-NMSC-062, 120 N.M. 579, 583, 904 P.2d 28, 32. "Moreover, we are less likely to defer to an agency's interpretation of the relevant statute if the statute is clear and unambiguous, as it is in this case." *See Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n,* 2006–NMSC–032, ¶ 10, 140 N.M. 6, 139 P.3d 166. The Department has provided no sound reason to justify its interpretation of Section 2-7-5.5 to include "domicile." Moreover, no deference should be given to the Department's interpretation of the statute because applying "domicile" would render the statute "absurd, unreasonable, or unjust." *See GEA Integrated Cooling Tech. v. State Taxation and Revenue Dept.,* 2012 NMCA-010, 268 P.3d 48 (2011). The Legislature clearly set the parameters for granting an exemption to Indians living and earning an income on a reservation. The Department's additional requirement of "domicile" would render the statute unreasonable and inconsistent with the federal law principles and the statute itself barring the imposition of taxes on Indians. It is unjust because the Department's

arbitrary action defies the Legislature's intent in recognizing tribal sovereignty and protecting tribal members from state taxation.

Second, the Department fails to recognize that fundamental New Mexico law does not permit an agency to unilaterally alter, modify or extend the reach of a law created by the legislature. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 22, 961 P.2d 768. The Legislature did not grant the Department any authority or jurisdiction in the statute to alter the language of the statute by adding the word "domicile." And, "an agency may not create a regulation that exceeds its statutory authority." *Gonzales v. N.M. Educ. Ret. Bd.*, 1990-NMSC-024, 109 NM 592, 595, 788 P.2d 348, 351. Indeed, under the statute the Department has no authority to make or enforce rules, regulations, and orders to carry out the act, and accordingly has not sought to devise a rule regulation or order adding the word "domicile" into Section 2-7-5.5. Nor does the exemption statute cross reference the New Mexico statutes and regulations on residency and domicile, NMSA 1978, § 7-2-2 (S) (2003) and Regulation 3.3.1.7 NMAC (4/29/2005). The Department has impermissibly exercised its authority by imposing the "domicile" standard in several income tax matters. However, the administrative hearing officers, as here, have rejected the Department's unlawful actions.[3] If Section 2-7-5.5 does not

[3] *In The Matter of the Protest of Aurelia Shorty,* Decision and Order No. 11-17 (Aug. 17, 2011); *In The Matter of the Protest of John and Bonnie Yearley to Assessment Issued Under Letter* ID NOS. L0242017536, L1555588352,

authorize the Department to alter, modify or extend the reach of law, and it does not, then the Department has no authority whatsoever to require Petitioner be a "domicile" of the reservation.

Third, the Department's argument encourages the court to construe the phrase "lives within the boundaries" to be synonymous with the word "domicile," to be consistent with changing case law. The Department's argument, however, violates the statutory rule of construction that prohibits reading any language into a statute which is not there. *See Burroughs v. Bd of County Com'rs of Bernalillo County,* 1975 -NMSC-051, 88 N.M. 303, 306, 540 P.2d 233, 236. Moreover, the Department's interpretation of Section 2–7– 5.5 would have the court read into the statute language, "domicile" that is not there, which the court should not do if the provision makes sense as written. *See High Ridge Hinkle Joint Venture,* 1998–NMSC–050, ¶ 5, 126 N.M. 413, 970 P.2d 599; *State ex rel. Barela v. New Mexico State Bd. of Ed.,* 1969-NMSC-038, 80 N.M. 220, 453 P.2d 583 (1969). There is no indication anywhere in the exemption law that the Legislature intended the Department's new approach to require a tribal member who lives on a reservation

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L1081402624, L0702604544, L0112911616, L1945068800, Decision and Order No. 11-29 (Dec. 2, 2011); *In the Matter of the Protest of Edward J. Clah and Melvina Murphy to Assessment Issued Under Letter* ID NOS. L2024160832, L1755725376, L0587583040, L0050712128, L2097532480 AND L0933084736, Decision and Order No. 12-19 (Sept. 21, 2012)

to additionally be a domicile of the reservation to have the exemption apply. The plain language of Section 2-7-5.5 does not impose such a scheme. Accordingly, the court should not read "domicile" into the Act.

Fourth, the courts "interpret the statute so as to mean what the legislature intended it to mean, and to accomplish the ends sought to be accomplished by it." *State ex rel. Sanchez v. Reese*, 1968-NMSC-186, 79 N.M. 624, 625, 447 P.2d 504, 505 . In 1978, the Legislature sought to exempt tribal members income earned while living on a reservation from state income taxes. Section 2-7-5.5 accomplishes the Legislature's intent to do so. Now, the Department urges this court to sanction its unauthorized actions to alter the statute by adding the word "domicile" into the statute, thereby, requiring a tribal member taxpayer to prove she lives and is domiciled on the reservation. The Legislature did not include the word "domicile" and only intended the word "live" on a reservation be required, nothing more. The additional requirement urged by the Department contradicts the ends sought to be accomplished by the Legislature.

Finally, if the New Mexico Legislature had intended to modify the exemption for income taxes on tribal members, it could readily have demonstrated such an intent by including language to that effect. The Legislature did not. The Hearing Officer declined to read "residency" or "domicile" into NMSA § 7-2-5.5. This court should decline to read such language into the statute too. Indeed, there is

no authority for the Department to circumvent the statutory scheme established by the Legislature. Since 1978, the Legislature has never amended the exemption. The Department is seeking an "end run" around the exemption statute and asking this court to condone its improper actions. It is the Legislature's decision to amend, alter, or modify the law, not the Department.

B. *Chickasaw Nation* and *Sac and Fox* Upon Which the Department Relies Did Not Change the Law

The principal thrust of the Department's argument rests on language in two Supreme Court cases originating in Oklahoma, *Okla. Tax Comm'n. v. Sac & Fox Nation*, 508 U.S. 114 (1993) ("*Sac & Fox*"); *Okla. Tax Comm'n. v. Chickasaw Nation*, 515 U.S. 450 (1995) ("*Chickasaw Nation*"), which it contends to be decisive of its use of the word "domicile" in applying Section 2-7-5.5. The Department's assertions rest on a misunderstanding of the cases. Moreover, the cases concern the interpretation of different Tribal treaties, and state taxing schemes.[4] Importantly, neither Oklahoma case involved the New Mexico tax exemption statute in question here.

As we explained, decisions such as *McClanahan* and *Hunt* have recognized a strong presumption against state taxation of the reservation income of Indians

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[4] Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333, and Treaty with the Sac and Fox Indians, 1891, 26 Stat. 745. Oklahoma Income Tax Act, Okla. Stat. Tit. 68 § 2351 et seq.

who live on formal reservations and derive their income from reservation sources. The Supreme Court in *Sac & Fox* addressed whether tribal members who resided within Sac and Fox jurisdiction are subject to both state and tribal income taxes. *Sac & Fox, supra,* 508 U.S. at 118. Oklahoma argued that unless the members of the Sac and Fox Nation live on a formal "reservation," the state had jurisdiction to tax their earnings. The Court rejected this argument stating,

> [t]he 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." Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. See 18 U.S.C. § 1151.

Id. at 115 (emphasis added), *citing Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe,* 498 U.S. 505, 511 (1991). The Department splices the passing use of the word "residence" in *Sac & Fox* and declares a new standard. The short answer to the Department's assertion is that it is simply wrong.

The Court held that, absent explicit congressional consent, the state did not have jurisdiction to tax tribal members who lived and worked in 'Indian country." In *Sac & Fox,* whether the specific tribal territory consisted of a formal or informal reservation, allotted lands, or dependent Indian communities, precedent favored tribal jurisdiction, according to the Court. The Court remanded for a

determination of whether the tribal member employees upon whom the Oklahoma tax commission wanted to impose the income and vehicle taxes were living in Indian country. *Id.* at 126.

In short, the Court held that *McClanahan* was not limited to Indians living on a formal reservation as here, and that residency in Indian country was sufficient to invoke the *McClanahan* presumption against tax jurisdiction. *Id.* With respect to tribal members residing either on the formal reservation or in Indian country and earning income from tribal employment in Indian country, it is clear that pursuant to *Sac and Fox* the rule of *McClanahan* continues to bar imposition of the state income tax. Contrary to the Department's claim, *Sac & Fox* did not change the law regarding "residence." It is a reaffirmation of the rationale in *McClanahan.*

At issue in *Chickasaw Nation* was the state's claim for motor vehicle taxes on a retailer and income taxes on tribal members. The Supreme Court stated,

> [W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: 'Absent cession of jurisdiction or other federal statutes permitting it,' . . . a State is without power to tax reservation lands and reservation Indians."

Chickasaw Nation, 515 U.S. 450, 458, *quoting County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992.

Given the categorial nature of tribal and Indian immunity from state taxation within Indian country, and the mix of Indian country lands in Oklahoma, the

Oklahoma tax commission has sought to make distinctions in land ownership to collect taxes from tribal people, including those who work for the tribe on tribal lands, but live outside Indian country. It was partially successful in the *Chickasaw Nation* case.

The question before the Court was whether Oklahoma may apply its income tax to members of the Chickasaw Nation who work for the Tribe but who live outside of Indian country. The Chickasaw Nation argued that the specific provision of their Treaty of Dancing Rabbit Creek provided that no "(s)tate shall ever have a right to pass laws for the government of the (Chickasaw) Nation of Red People and their descendants." 515 U.S. at 466. The Chickasaw Nation claimed this treaty provision sheltered their members, the descendants of the provision, from state taxes regardless of where the member-employee lived, on or off-reservation. *Id.*

However, the Court in a 5-4 decision rejected the Chickasaw Nation's argument that express federal law, the Treaty, should be extended off-reservation and override the general tax rules that apply to Indians outside of reservation boundaries or Indian country. *Id.* at 466 ("clear geographic limit to treaty"). The majority looked to the general international and interstate tax rules that domicile is determinative for off-reservation taxing purposes. *Id.* at 463. Since the Chickasaw

tribal members lived off-reservation, the Court permitted the state to treat them as domiciles of the state and impose its tax.[5]

The Department claims because the Court in *Chickasaw Nation* used the general tax principles of "domicile" to permit Oklahoma to tax off-reservation income, it has free rein to use "domicile" in New Mexico's tax exemption statute, and to tax on reservation income. The Department argues Petitioner "must both [be] **domiciled** and work within the Navajo jurisdiction to be eligible for the state income tax exemption." App. Br. at i (emphasis in original).

This is a total misinterpretation of the *Chickasaw Nation* case. The Court did not apply the application of the general tax principles including the word "domicile" to members living on-reservation because of the categorical presumption against state taxes on reservation, and the state had not sought to tax on-reservation income. The Court applied the domicile principles to off-reservation tribal members residents only.

Indeed, the application of "domicile" by Oklahoma (and the Department here) to on-reservation affairs directly conflicted with the established law which vested authority and jurisdiction only in the Chickasaw Nation and the United

[5] Justice Breyer writing for the Dissent, took issue with the majority using general and international tax principles to limit the reach of the Chickasaw's Treaty. *Id.* at 468 – 470.

States and was invalid. See, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Bryan v. Itasca County*, 426 U.S. 373 (1976). Nor can the *dicta* in *Chickasaw Nation* upon which the Department relies be read, under any construction, to reverse or abandon basic principles of federal law established over 200 years ago in *Worcester v. Georgia* and consistently followed since then. The law remains that tribal sovereignty and the federal authority is exclusive in Indian territory, and leaves no room for the state to legislate otherwise (or the Department to unilaterally apply its own interpretation).

The question here is one of statute interpretation explicitly exempting state income taxation of Indians living on reservation, unlike the situation in *Chickasaw Nation.* Petitioner is seeking an exemption for her income earned on the Navajo reservation when she lived there in 2012. The Department's argument wholly undermines the Legislature's decision to exempt such income, *Hunt*, and Supreme Court precedent that taxing Indians is impermissible absent clear congressional authorization. There is nothing in Section 2-7-5.5 mandating Petitioner prove she was domiciled on the reservation. Nor is there is any lawful basis on which the Department may set domicile requirements for Indian taxpayers.

Nothing contained in the Supreme Court's opinions in *Chickasaw Nation* or *Sac & Fox Tribe* altered the holdings of *McClanahan* and *Hunt.* There remains, as applied by this Court in *Hunt,* that state taxation of tribal members living on

reservation and earning income on reservation is precluded. And, as decided in *McClanahan* the Navajo Treaty of 1868 bars imposition of the state tax on-reservation. The rule of law has not been changed to warrant any action by the Legislature, and surely not to adopt the Department's interpretation.

CONCLUSION

The Department has failed to articulate any principled reason why the word "live" should be discarded and be replaced by "domicile. It's unprecedented interpretation of the rule of law and Section 2-7.5.5 rest on a misunderstanding of the Supreme Court's decisions in *Sac & Fox and Chickasaw Nation.* The decision of the Hearing Officer should be affirmed.

Dated this 10th day of August, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify, that a true and correct copy of the foregoing Answer Brief of Petitioner-Appellee was mailed and emailed to Counsel at the following address on this 10th day of August, 2020.

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