

Apache Tribe v. Jones, 411 U.S. 145 (1973), and Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995), constitute sufficient federal support for the practice of taxing the out-of-state income of resident tribal members; (4) that the balancing of state and tribal interests, particularly in light of the benefits and privileges of residency allegedly afforded by the State to tribal members on the reservation, weigh heavily in favor of state taxation of the out-of-state income at issue; (5) that the federal district court in Wisconsin erred in its due process and residency analyses in Zeuske; and (6) that the imposition of Minnesota income tax on the out-of-state income of resident tribal members does not infringe on tribal self government.

What the State has not provided is express federal authorization to tax the out-of-state income of tribal members who reside on their reservation, as required under applicable U.S. Supreme Court precedent.

Following are the Fond du Lac Band's responses to each of these arguments in turn.

I. THE IDENTIFICATION OF ALL TRIBAL MEMBERS AFFECTED BY THE BAND'S DECLARATORY ACTION AND THE NATURE OF THEIR OUT-OF-STATE INCOME ARE NOT NECESSARY TO THE RESOLUTION OF THE QUESTION OF LAW BEFORE THE COURT.

The State's memorandum contends that summary judgment at this stage of the proceedings would be inappropriate because the Band has not provided specific, individualized substantiation of all "similarly situated" Band members who reside on the Reservation and "allegedly" derive income from out-of-state sources because, the State asserts, such information is "material to the outcome of this action as the McClanahan tax

immunity principle does not apply to income generated by activities outside of the Reservation” (id. at 2, 5, quoted at 18).

First, the State in its Answer to the Band’s amended complaint conceded that the Band has standing to bring this action, and that the Court has jurisdiction over the question presented. See id. at ¶ 4. Second, the materiality of the additional information sought by the State regarding similarly situated Band members is not established by the State’s legal conclusions as to the very issue before the Court. Finally, the Band responded by interrogatory that it was not in possession of the identifying information sought by the State, because the Band does not routinely collect information regarding non-Band employment or income of its members.

Rather, the addition of “similarly situated” Band members in the Band’s Complaint is based on the fact that approximately half of the Band’s 4200 members reside on the Reservation; the Reservation is only 15 miles from the Wisconsin border;¹ and the Reservation Business Committee has informal but direct knowledge of various Band members who derive income from out of state, including employment, pensions, annuities, investments, etc. The Band accordingly urges the Court to take judicial notice that there are, and will be in the future, unidentified, similarly situated Band members as Mssrs. Houle and

¹ The part of the Reservation in Duluth, Minnesota on which the Fond-du-Luth Casino is located is approximately five miles from Wisconsin, and the Band in fact has interests in several parcels of trust land in Wisconsin.

Diver who live on the Reservation and derive income from out-of-state sources.² Accord Lac du Flambeau Band of Lake Superior Chippewa v. Zeuske, 145 F.Supp.2d 969, 977 (W.D. Wis. 2000); see also note 11 infra and accompanying text.

Nor would the nature of such out-of-state income be material to the issue before the Court. The issue before the Court is whether the State has authority under federal law to tax income, earned outside the State, of a tribal member who resides on his tribe's reservation where the *sole basis* for such taxation is the tribal member's alleged status as a Minnesota resident. Assuming, arguendo, that the answer is "no", and the State later produces some income-specific federal authority for imposing its tax, that situation would lie outside of the issue presently before the Court.

II. THE RATIONALE OF McCLANAHAN AS TO THE IMMUNITY THAT ATTACHES TO THE RESERVATION RESIDENCY OF TRIBAL MEMBERS IS EQUALLY APPLICABLE IN THIS MATTER.

The State is attempting to contain McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) to its specific holding, arguing that the decision operates to limit tribal immunity from state taxation to income derived by resident tribal members from reservation sources alone. This construction of McClanahan fails to view that decision, by its own terms, against the "backdrop" of the tribal sovereignty doctrine. Id., 411 U.S. at 172. The McClanahan Court fully examined the legal territorial barriers created by Indian country to against state tax

² See Fed.R.Evid. 201(b)(1) & (d); Qualley v. Clo-Tex Int'l, Inc., 212 F.3d 1123, 1128 (8th Cir. 2000)(a trial court may take judicial notice under Fed.R.Evid. 201(b)of adjudicative facts which are"not subject to reasonable dispute and which are "generally known within the territorial jurisdiction of the trial court).

authority of tribal members, and clearly concluded that reservation residence alone does not constitute a sufficient legal basis for state taxation of tribal members: “Indians and Indian property on an Indian reservation are not subject to State taxation except where Congress has expressly provided that State laws shall apply.” Id., 411 U.S. at 170-71. This rule of decision applies to the present action as well.

The cases cited by the State in support of its narrow reading of McClanahan are all distinguishable as involving either non-Indians or otherwise taxable off-reservation activity elsewhere within the State, and as such actually support the Band’s position that the reservation residency of a tribal member cannot be used as an independent basis for state taxation.³ The State provides no federal authority directly supporting its position.

³ See Wagon v. Prairie Band Potawatomi Indian Nation, 546 U.S. 95, 112-13 (2005) (upholding state fuel tax on non-Indian distributors); Oklahoma Tax Comm’n v. Chickasaw Nation, 515 U.S. 450, 463 (1995) (upholding state income taxation of tribal members employed by their tribe on tribal lands but residing outside of Indian country elsewhere within the state); Dept. of Taxation v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 73-74 (1994) (upholding state taxation of non-Indian cigarette distributors in Indian country); Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 513 (1991) (upholding state taxation of tribal cigarette sales to non-Indians); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175 (1989) (upholding state gas and oil severance tax on non-Indian producer operating on-reservation); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 143, 156 (1980) (upholding state taxation of tribal cigarette sales to non-Indians); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) (upholding state taxation of income earned off-reservation but elsewhere within the state by a tribal member who resided on-reservation); Jefferson v. Comm’r of Revenue, 631 N.W.2d 391, 396 (Minn. 2001) (upholding state taxation of per capita payments received by a tribal member who lived off-reservation but elsewhere within the State); Littlewolf v. Girard, 607 N.W.2d 464, 466-67 (Minn. Ct. App. 2000) (upholding state taxation of state lottery winnings by a tribal member who resided on-reservation but redeemed ticket off-reservation); and Esquiro v. Dep’t of Revenue, No. 3954, 1997 Westlaw 43194 (Or.Tx. Ct. 1997) (upholding taxation of out-of-state income of an Alaskan Native residing in Indian country in Oregon and not governed by his own tribe); cf. Cass County, Minnesota v. Leech

There is no dispute that Mssrs. Houle and Diver are members of the Fond du Lac Band and reside on the Fond du Lac Reservation. See Defendant’s Memorandum at 3. They are, therefore, “reservation Indians” for the purposes of our analysis, and state taxation of their out-of-state income is subject to a rebuttable presumption against state jurisdiction. See, e.g., Oklahoma Tax Comm’n v. Chickasaw Nation, 515 U.S. 450, 455-56 (1995); Oklahoma Tax Comm’n v. Sac and Fox Nation, 508 U.S. 114, 128 (1993); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n. 17 (1987); Montana v. Blackfeet Tribe, supra, 471 U.S. 759, 764, 766 (1985); Bryan v. Itasca County, 426 U.S. 373, 393 (1976); and McClanahan, supra, 411 at 181. See also Argument IV, infra. The State does not meet its burden of providing specific federal authority for taxing the out-of-state income of reservation Indians by relying upon inapposite decisions involving non-Indians and off-reservation connections elsewhere within the State.

III. NEITHER MESCALERO APACHE NOR CHICKASAW NATION AUTHORIZE STATE TAXATION OF THE OUT-OF-STATE INCOME OF TRIBAL MEMBERS RESIDING ON THEIR RESERVATION.

Throughout its memorandum, the State relies upon Mescalero Apache Tribe v. Jones,

Lake Band of Chippewa Indians, 524 U.S. 103, 113-14 (1998)(upholding state taxation of tribally-owned fee land on reservation where Congress had given express consent under federal allotment statutes); Oklahoma v. Sac and Fox Nation, 508 U.S. 114, 123, 128 (1993) (question of state taxability of tribal member employees remanded for inquiry into Indian country residency, adding that “[a]bsent explicit congressional direction to the contrary, we presume against the States having jurisdiction to tax within Indian country”); and Maryboy v. Utah Tax Comm’n, 904 P.2d 662, 668-69 (Utah 1995)(upholding state tax of income by tribal member for services partially performed on reservation as county commissioner; court treated income as earned off-reservation for analysis purposes).

411 U.S. 145 (1973) and Oklahoma Tax Comm’n v. Chickasaw Nation, 515 U.S. 450 (1995) as its authority for taxing the out-of-state income of tribal members residing on their reservation. In Mescalero Apache, a companion case to McClanahan, the Court upheld the applicability of a state gross receipts tax to a tribally-operated ski resort on fee land off-reservation elsewhere within the state. In doing so, the Court observed that “[a]bsent federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.” Id., 411 U.S. at 148-49. The Court later expressly clarified Mescalero Apache as limited to “tribal activities occurring within the State but outside Indian country.” Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751, 755 (1998)(upholding tribal sovereign immunity in a contract action arising off-reservation)(citing Mescalero Apache, 411 U.S. at 148-49)(emphasis added).

Chickasaw Nation held that a state can tax the income of a tribal member earned as an employee of the tribe on the tribe’s reservation where the member resides off of the reservation elsewhere within the state. Id., 515 U.S. at 462-63. In this context, the Court stated that “a jurisdiction ... may tax all the income of its residents, even earned outside the taxing jurisdiction”, id.,⁴ an observation that is relied upon heavily by the State here (see Defendant’s Memorandum at 1, 7, 25, & 28 n. 13). Chickasaw Nation does not support the State’s position: the “resident” in was a tribal member who lived off-reservation, and the

⁴ Citing Shaffer v. Carter, 252 U.S. 37, 57 (1920)(“as to residents, a State ‘may, and does, exert its taxing power over their income from all sources’; as to nonresidents, ‘the tax is only on such income as is derived from ... sources [within the State]’”).”

“income earned outside the taxing jurisdiction” was income earned by that member while employed by his tribe on his reservation.

Neither Mescalero Apache nor Chickasaw Nation confer taxing authority upon the state which it otherwise lacked, but merely held that the Indian status of the taxpayers did not operate as a barrier to state taxes which otherwise applied because of their off-reservation contact with the state: Mescalero Apache involved tribal business activity off-reservation elsewhere within the state; Chickasaw Nation involved residence by tribal member-employees off-reservation elsewhere within the state. By contrast, the present action involves **NO off-reservation contact elsewhere within the State.**

As demonstrated above and in the Band’s earlier memorandum, a tribal member’s residency on his or her reservation does not alone provide a sufficient legal basis for state taxation of the member or the member’s property. Without any specific federal authority or some other nexus to the State, taxation of the out-of-state income of a tribal member residing on his tribe’s reservation violates the member’s rights due process clause because the State has nothing else on which to base its tax: there must be “‘some definite link, some minimal connection, between a state and the person, property or transaction it seeks to tax,’ as well as a rational relationship between the tax and the ‘values connected with the taxing State.’” Meadwestvaco Corp. v. Illinois Dept. of Revenue, ___ U.S. ___, ___, 128 S.Ct. 1498, 1505 (2008); see also Hunt-Wesson, Inc. v. Franchise Tax Board of California, 528 U.S. 458, 463-64 (2000); Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 165-66 (1983); Moorman Mfg. Co. v. Blair, 437 U.S. 267, 273 (1978); Miller Brothers Co. v. Maryland, 347

U.S. 340, 344-45 (1954); and Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)(“The simple but controlling question is whether the state has given anything for which it can ask in return”).

Taxation by the State of Minnesota of income derived by members of the Fond du Lac Band who reside on the Fond du Lac Reservation fails to meet this nexus requirement and therefore violates the constitutional due process rights of those members.

IV. THE STATE ERRONEOUSLY BALANCES STATE AND TRIBAL INTERESTS IN THIS MATTER, AND CLAIMS TO CONFER THE PRIVILEGES OF RESIDENCY TO TRIBAL MEMBERS WHO RESIDE ON THE RESERVATION.

The State rejects the per se rule requiring express congressional consent to state taxation of reservation Indians,⁵ and applies instead a balancing of state and tribal interests, asserting that its taxation of tribal members in this matter is justified by the privileges of residency conferred upon them by the State (See Defendant’s Memorandum at 1, 7-8, 13-14-17, 23-25, 32). The State is mistaken in this approach because the Supreme Court has declared on numerous occasions that, if the legal incidence of a state tax falls on reservation Indians, a categorical test applies as to whether Congress has authorized the tax:

When a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country . . . we have employed, instead of a balancing inquiry, “a more categorized approach: ‘[A]bsent cession of jurisdiction or other federal statutes permitting it,’ we have held a State is without power to tax

⁵ See Defendant’s Memorandum at 12 (“the Court has repeatedly upheld state tax authority in the absence of any congressional consent, even when that authority reaches on-reservation activity, reservation residents, or reservation income. The Band thus incorrectly argue that state authority within reservation boundaries ‘requires clear congressional authorization’”) (citing Plaintiff’s Memorandum at 10).

reservation lands and reservation Indians ... Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or tribal members inside Indian country.

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995)(quoting County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 258 (1992), and citing Bryan v. Itasca County, 426 U.S. 373 (1976); and McClanahan, *supra*, 411 U.S. at 165-66)(emphasis added)); see also California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 n. 17 (1987)(“We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the State interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.”).⁶

This per se rule creates a rebuttable presumption against state tax authority over reservation Indians. See, e.g., Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 128 (1993)(“Absent explicit congressional direction to the contrary, we presume against a

⁶ The balancing approach employed by the State is appropriately applied to situations in which the legal incidence of a state tax falls on a nonmember and results in an economic burden on a tribe or its members, thus triggering a preemption analysis involving “a particularized inquiry into the nature of the state, federal, and tribal interests at stake ... to determine whether, in the specific context, the exercise of state authority would violate federal law.” White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980) (preempting state taxation of a nonmember logging company where the activity furthered federal Indian policy objectives and was subject to comprehensive federal regulation); Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 841-42 (1982)(preempting state gross receipt tax on non-Indian company constructing a tribal school on reservation as undermining federal Indian policy of promoting tribal self-sufficiency); compare Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 186 (1989)(upholding state tax on non-Indian oil producer as permissible where specifically supported by federal statute and company had substantially benefitted from state services).

State’s having the jurisdiction to tax within Indian country”).

In its erroneous application of the balancing test to this matter, the State asserts that “Reservation residents ... enjoy the privileges provided by state government”; that “[p]ayment of taxes secures to the citizen ‘that derived from his enjoyment of living in an organized society, established and safeguarded by the devotion of taxes to public purposes’”; that “[l]ike all Minnesota citizens, Reservation residents enjoy the benefits of ‘living in the safety and freedom and of being protected by the law’”; that “they enjoy the advantages equally available to all Minnesota citizens, such as public libraries, public education ..., public protection, and public health services”; and that [t]he State also contributes to many of the services Minnesota Tribes provide to their members.” Defendant’s Memorandum at 24-25 (citing Carmichael et al. v. Southern Coal & Coke Co., 301 U.S. 495, 522 (1937); Jefferson v. Comm’r of Revenue, 631 N.W.2d 391, 395 (Minn. 2001); Luther v. Comm’r of Revenue, 588 N.W.2d 502, 506-07 (Minn. 1999); and Minn. Stats. §§ 116J.8731; 122A.63; 134.32 & 256E.30).

This service-based justification for state taxation of reservation Indians is an assimilationist affront to the Fond du Lac Band’s right “to make their own laws and be ruled by them”, Williams v. Lee, 358 U.S. 217, 220 (1959), and was rejected by the Supreme Court in both McClanahan,⁷ and Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 476

⁷ 411 U.S. at 173 & n. 12 (“Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization”)(quoting The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1867)), and noting substantial federal defrayment of state expenses).

(1976)(upholding the district court’s rejection of the State’s assertion that “tribal members ‘are now so completely integrated with the non-Indians ... that there is no longer any reason to accord them different treatment than other citizens’”)(citing 392 F.Supp. 1297, 1315); accord Lac du Flambeau Band of Lake Superior Chippewa v. Zeuske, 145 F.2d 969, 975 (W.D.Wisc. 2000)(rejecting state service-based justification for taxing the out-of-state income of resident tribal member).

The State’s unfortunate assertion that it has conferred the privilege of “living in an organized society” upon members of the Fond du Lac Band who live on the Fond du Lac Reservation disregards the historical fact that the Band preexisted both the United States and the State of Minnesota as an independent political entity by several hundred years. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978)(as pre-constitutional sovereigns, tribes remain a ‘separate people’ retaining their aboriginal rights of self-government) (quoting United States v. Kagama, 118 U.S. 375, 381 (1886)); United States v. Wheeler, 435 U.S. 313, 322-23 (1978)(“Before the coming of the Europeans, the tribes were self-governing sovereign political communities” and continue to retain “attributes of sovereignty over both their members and their territory”)(quoting United States v. Mazurie, 418 U.S. 544, 557 (1975)); and generally William W. Warren, History of the Ojibway People (1885).

The Fond du Lac Band reserved⁸ its territorial occupancy of the Fond du Lac

⁸ “[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted.” Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 680 (1979)(quoting United States v. Winans, 198 U.S. 371, 381 (1908)).

Reservation under the Treaty of LaPointe, Sept. 30, 1854, 10 Stat. 1109, four years before Minnesota became a state. The Band's antecedent right of domicile has long been recognized by the federal courts, see, e.g., United States v. Thomas, 151 U.S. 577, 582-85 (1894) (recognizing that the Treaty of LaPointe incorporated the prior tribal right of occupancy), accord Cardinal v. United States, 954 F.2d 359, 364 (6th Cir. 1992)(citing Thomas), and in no way derives from the sufferance or accommodation of the State.⁹ The State's argument that its has afforded the benefits of civilization and the privileges of residency and to Band members on the Reservation is pure fallacy.

V. THE STATE'S EXPANSIVE INTERPRETATION OF RESIDENCY AND REJECTION OF ZEUSKE AS PERSUASIVE PRECEDENT FAILS TO RECOGNIZE THE CONTROLLING EFFECT OF FEDERAL LAW AS IT PERTAINS TO RESERVATION RESIDENCY OF TRIBAL MEMBERS.

The State argues that the determination of residency and domicile are ultimately functions of state law; that the State's definition of "residency" for tax purposes includes tribal members who reside on Minnesota reservations; "Reservation residents are also state residents ... They are therefore 'subject to nondiscriminatory state law applicable to all citizens of the State' ... "Residency establishes a basis for the State's taxing jurisdiction." Defendant's Memorandum at 26-29 (quoted at 28, 29)(citing Mescalero Apache, supra, 411

⁹ See also Minnesota v. Mille Lacs Band of Chippewa Indians et al., 526 U.S. 172, 197 (1999)("we interpret Indian treaties to give effect to the terms as the Indians understood them")(citing Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979) and United States v. Winans, 198 U.S. 371, 380-81 (1905)); and Charles F. Wilinson, American Indians, Time and the Law 100-02 (1987)(the primary objectives of the tribes in entering into the treaties were to preserve their status as separate cultural and political entities and to secure the protection of the federal government against state intrusion).

U.S. at 149; McClanahan, *supra*, 411 at 166 n. 3; and New York ex rel. Cohn v. Graves, 300 U.S. 308, 313 (1937); and Minn. Stat. § 290.01, subd. 7). The State extrapolates from this self-generated authority the conclusion that reservation Indians are to be treated as residents of the State for the purposes of satisfying due process nexus requirements as to the taxability of their out-of-state income, and that the federal district court's decision in Lac du Flambeau Band of Chippewa Indians v. Zeuske, 145 F.Supp.2d 969 (W.D. Wis. 2000) by failing to recognize that state law is determinative of all residency issues, even to the exclusion of federal constitutional and Indian law principles. *Id.* at 27-29.

The states made the same argument in McClanahan and Moe. By this reasoning, state determinations of residency would be singularly dispositive of all tax matters involving reservation Indians, further inquiry into the locus of the income-generating activity at issue would not be necessary, and McClanahan and its progeny were all wrongly decided. However, that is not the law. A state cannot tax tribal members residing on their reservation without congressional authority, *supra*. The only precedent that the State has advanced in support of its argument is off-point, involving non-Indians or other off-reservation contact with the State, *supra* note 3.¹⁰ As observed by Judge Crabb in Zeuske:

¹⁰ Public Law 280. The State is also preempted from exercising its tax authority over tribal members on their reservation under Public Law 280. See, e.g., Bryan v. Itasca County, 426 U.S. 373, 387, 390 (1976)(striking down Minnesota imposition of its personal property tax on the mobile home of a tribal member on-reservation: “Public Law 280 was plainly not meant to effect total assimilation ... if Congress in enacting Pub.L. 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so”). In order to expand existing state jurisdiction under P.L. 280, there must be a special election among tribal members residing on the Reservation held by the Secretary of the Interior. See 25 U.S.C. § 1326; accord Iowa Mutual Ins. Co. v.

[I]f residence on a reservation were equivalent to residence within a state, a state could claim authority to collect a tax merely by showing that a tribal member lived on a reservation within the state's borders. If this were the law, the Supreme Court would not have barred the states of Arizona, Montana and Washington from imposing taxes on reservation Indians within their states ... Congress has never authorized the states to tax tribal members living on reservations solely because of their residence within the taxing state. Without such authorization, Wisconsin has no legal right to tax Jackson or any other tribal member similarly situated.¹¹

Id., 145 F.Supp.2d at 977 (citing McClanahan; Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 469 (1976); and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 143 (1980)(emphasis added)).

The State's overreaching interpretation of residency attempts to avoid both the per se standard established by the Supreme Court for federal court review of state taxation of reservation Indians and the due process requirement that there must be some tangible nexus between the state and the object of taxation. However, the State's argument that it can treat reservation Indians as state residents for the purpose of taxing their out-of-state income is irreconcilable with McClanahan et al., and without that justification, the imposition of its

LaPlante, 480 U.S. 9, 13 n. 4 (1987); Bryan, supra, 426 U.S. at 386; and Kennerly v. District Court, 400 U.S. 423, 428 (1981). This has never occurred since P.L. 280 was enacted in 1953. Cf. Shakopee Mdewakanton Sioux Community v. City of Prior Lake, 771 F.2d 1153, 1158-59 (8th Cir. 1985)(tribal consent under Section 1326 not necessary where municipal annexation of Indian country did not operate to expand state jurisdiction under P.L. 280), cert. denied, 475 U.S. 1011 (1986).

¹¹ See also the Order of Declaration in Zeuske: "IT IS DECLARED that members of the plaintiff tribe are not subject to Wisconsin income tax if they live on the reservation and earn no taxable income outside the reservation boundaries and within the State of Wisconsin, where the only basis for collecting the tax is the tribal member's state residence." 145 F.Supp.2d at 977 (emphasis added).

tax fails to satisfy the due process test as well.

VI. THE STATE'S ARGUMENT THAT IT'S EXERCISE OF CONCURRENT TAXING AUTHORITY OVER TRIBAL MEMBERS ON THE RESERVATION DOES NOT INFRINGE UPON TRIBAL SELF-GOVERNMENT IS CONTRARY TO FEDERAL LAW.

Relying upon its assimilationist construction of residency, the State asserts that it possesses inherent authority to tax all income of all persons residing within the State, including reservation Indians; that this authority operates concurrently with the Band's authority to tax its own members; and that state taxation of tribal members on the reservation presents no infringement upon the Band's treaty-based right to self-government. See Defendant's Memorandum at 31-34. Further, the State asserts that "Trib[al] 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." Id. at 32-33. Again, the State's support for this argument entirely consists of inapposite decisions involving non-Indians or off-reservation conduct elsewhere within the state.¹²

¹² See Wagnon v. Prairie Band Potawatomi Indian Nation, 546 U.S. 95, 112 (2005) (upholding imposition of state fuel tax on non-Indian distributors); Arizona Dept. of Revenue v. Blaze Const. Co., Inc., 526 U.S. 32, 37 n. 2 (1999) (upholding state taxation of nonmember company performing highway construction on-reservation); Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 466 (1995) (rejecting tribal efforts to immunize income of tribal members who resided outside of Indian country elsewhere within the state); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 145 (1980) (preempting state taxation of non-Indian loggers, applying the balancing test, see note 6 supra); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 157-58 (1980) (upholding state taxation of tribal cigarette sales to nonmembers); Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 483 (1975) (upholding state taxation of cigarette sales to non-Indians); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 153

State conduct violates the tribal right of self-government if it has not been specifically authorized by Congress and if “the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” Williams v. Lee, 358 U.S. 217, 220 (1959). The infringement test is triggered by situations in which a state action interferes or is incompatible with the control by a tribe over activities on its reservation, and is particularly sensitive to interference with the inter se relationship between a tribe and its members by outside governments. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978); and Fisher v. District Court, 424 U.S. 382, 386 (1976).

Tribal sovereignty operates as an independent barrier against state interference with tribal affairs, see, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980), and federal policy strongly supports the retention of tribal prerogatives of self-government, which has been characterized by the Court as being an “overriding goal”. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216-17 (1987)(citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987); and White Mountain Apache, supra); see also Indian Self-Determination Act, 25 U.S.C. § 450(b)(“the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments”).

This matter concerns state taxation of tribal members on the Reservation, and falls squarely within the ambit of the infringement doctrine; yet, the State characterizes the Band’s

(1973) (upholding state taxation of tribal income earned off-reservation elsewhere within the state); Thomas v. Gay, 169 U.S. 264, 273 (1898)(upholding state taxation of non-Indian railroad right of way across Indian country); and Crow Tribe of Indians v. State of Montana, 650 F.2d 1104, 1116 (9th Cir. 1981)(upholding state taxation of non-Indian coal mining company), cert. denied, 459 U.S. 916 (1982).

exercise of its governmental interests as an attempt “to interfere with *Minnesota’s* sovereign right to tax the wage earner’s worldwide income”, supra. The State’s errors in its disregard of the significance of the territorial rights of the Fond du Lac Band and its members on the Fond du Lac Reservation as secured under federal law.

CONCLUSION

The legal issue before the Court in this matter is the same as that in Lac du Flambeau Band of Chippewa Indians v. Zeuske, and Judge Crabb’s analysis and conclusions in Zeuske are similarly applicable to the question before the Court:

Left unexplained by defendant is the source of the state’s authority to impose a tax on [the tribal member]. She simply asserts that once Indians leave their reservation to work, they are subject to taxation. Obviously, this is true, but it does not address the situation in which the off-reservation work is not performed within the state in which the reservation is located ... Defendant cites no statute authorizing the state to impose taxes on Indians solely because of their residency on a reservation located within the state. Her efforts to show that plaintiff’s members receive benefits from the state is misguided. Similar efforts have been rebuffed by the Supreme Court ...

By contrast, plaintiff’s position is based upon established principles of federal Indian law that govern the taxation of Indian peoples and land and upon the due process clause of the United States Constitution, which requires a nexus between an activity and a state before the state can tax the activity ... In the end, however, it is impossible to escape the conclusion that the only basis on which defendant can defend its effort to collect income taxes on [the tribal member] is his residency. It is the only nexus [the State] has. But because that residency is on a reservation, the state cannot use it as a nexus. Under due process principles, the state cannot use as a reason to tax a residence that it has not provided or permitted ...

Id., 145 F.Supp.2d at 975-77 (citations omitted).

This Court should accordingly adopt the analysis and conclusions of the Zeuske decision, and grant the Fond du Lac Band’s motion for summary judgment.

Respectfully submitted this 9th day of October, 2009.

s/Dennis J. Peterson

DENNIS J. PETERSON

Bar Number 0208036

Tribal Attorney

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

LEGAL AFFAIRS OFFICE

1720 Big Lake Road

Cloquet, Minnesota 55720

Telephone: (218)878-2607

Fax: (218)878-2692