NEW MEXICO LAW REVIEW

Volume 25
Issue 1 *Winter 1995*

Winter 1995

Tax Law - New Mexico Taxes Non-Member Indians Who Work on a Reservation: New Mexico Taxation and Revenue Department v. Greaves

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TAX LAW—New Mexico Taxes Non-Member Indians Who Work on a Reservation: *New Mexico Taxation and Revenue Department v. Greaves*

I. INTRODUCTION

In *New Mexico Taxation and Revenue Department v. Greaves*[1] the New Mexico Court of Appeals held that income earned by Indians on reservations of which they are not tribal members is taxable by the state, expressly overruling *Fox v. Bureau of Revenue*.[2] Prior to *Greaves*, New Mexico did not regard tribal affiliation to be significant in determining the tax-exempt status of reservation Indians.[3] This Note examines how New Mexico, federal, and other state jurisdictions regard taxation of reservation Indians. Analysis of the *Greaves* decision will focus primarily on the court of appeals' reliance on the United States Supreme Court's decision in *Duro v. Reina*[4] and the court of appeals' failure to recognize the Congressional amendment which effectively overturned the *Duro* decision.

II. STATEMENT OF THE CASE

Leroy R. Greaves, an enrolled member of the Rosebud Sioux Tribe, lived on the Jicarilla Reservation and served as Chief Judge of the Jicarilla Tribal Court.[5] Greaves and appellee Elizabeth Reifel filed a joint state personal income tax return for 1989 deducting the amount Greaves earned that year as Chief Judge for the Jicarilla Court.[6] The deduction, initially granted by the Taxation and Revenue Department ("Department"), was subsequently disallowed, and the Department requested repayment. Appellees protested the adjustment, and a Department hearing officer, relying on *Fox v. Bureau of Revenue*,[7] ruled in their favor. The Department appealed from that ruling. The New Mexico Court of Appeals overruled the hearing officer's decision and held for the Department, expressly overruling *Fox*.

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1. 116 N.M. 508, 864 P.2d 324 (Ct. App. 1993).

2. *Id.* at 510, 864 P.2d at 326 (citing *Fox*, 87 N.M. 261, 531 P.2d 1234 (Ct. App.), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975), *cert. denied*, 424 U.S. 933 (1976). For purposes of this Note, a member Indian is an Indian living on the tribe's reservation of which he is a member. A non-member Indian is a member of a federally recognized tribe but living on another tribe's reservation.

3. *See* Fox v. Bureau of Revenue, 87 N.M. 261, 531 P.2d 1234 (Ct. App.), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975), *cert. denied*, 424 U.S. 933 (1975), *overruled by* New Mexico Taxation and Revenue Department v. Greaves, 116 N.M. 508, 864 P.2d 324 (Ct. App. 1993).

4. 495 U.S. 676 (1990).

5. The facts of this case are set out in *Greaves*, 116 N.M. at 509, 864 P.2d at 325.

6. *Id.*

7. 87 N.M. 261, 531 P.2d 1234 (Ct. App.), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975), *cert. denied*, 424 U.S. 933 (1976), *overruled by* New Mexico Taxation and Revenue Department v. Greaves, 116 N.M. 508, 864 P.2d 324 (Ct. App. 1993). The *Fox* court held tribal affiliation to be of no importance in determining the tax-exempt status of Indians as long as there was the coalescence of status as an Indian and location on a reservation. *Id.* at 262, 531 P.2d at 1235.

III. HISTORICAL BACKGROUND

A. *New Mexico Decides the Issue of Taxation on Indians: Ghahate v. Bureau of Revenue*

In *Ghahate v. Bureau of Revenue*,[8] the New Mexico Court of Appeals first addressed the issue of whether the state could impose an income tax on Indians working on a reservation.[9] The opinion addressed several issues: the sovereign powers of American Indian Tribes[10] and state infringement on tribal self-government; Congressional power to regulate commerce; and state authority to impose taxes on Indians.[11] In reaching its conclusion, the court did not distinguish between member and non-member Indians.[12]

First, in its brief discussion of tribal self-government, the *Ghahate* court reiterated the policy established by the U.S. Supreme Court in *Worcester v. Georgia*:[13] an Indian tribe is a distinct nation and the state does not have the legal authority to regulate the affairs of Indians on a reservation.[14] Furthermore, the *Ghahate* court noted that when Congress has wished the exercise of state power, it has expressly granted states the jurisdiction to do so.[15]

Second, the *Ghahate* court applied the federal Indian law infringement analysis developed in *Williams v. Lee*[16] to state income tax imposed on reservation Indians. In *Williams*, the U.S. Supreme Court stated that allowing the exercise of state jurisdiction over tribal affairs would both undermine the authority of tribal courts and infringe on the right of Indians to govern themselves.[17] The *Ghahate* court reasoned, however, that an income tax on Indians working on the reservation did not interfere or inconvenience reservation self-government in any way, and concluded that the infringement analysis did not bar the tax.[18]

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8. 80 N.M. 98, 451 P.2d 1002 (Ct. App. 1969). *Ghahate* was decided before McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973), in which the Supreme Court decided that reservation Indians were exempt from state income tax.

9. *Id.* at 99, 451 P.2d at 1003. In *Ghahate*, a Zuni Indian and a Navajo Indian both worked on the Zuni reservation deriving all of their 1967 income from that employment. *Id.*

10. The term "tribes" is used for general discussion for purposes of this Note, although indigenous nations use varied terms for their collective identity, e.g., nation, pueblo, band, village.

11. 80 N.M. at 99, 451 P.2d 1003.

12. *Id.* at 100, 451 P.2d at 1004. Although the facts involved a Zuni Indian and a Navajo Indian, the court treated both as reservation Indians.

13. 31 U.S. (6 Pet.) 515 (1832).

14. *Ghahate*, 80 N.M. at 99, 451 P.2d at 1003 (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).

15. *Id.* (citing Williams v. Lee, 358 U.S. 217, 221 (1959)).

16. 358 U.S. 217 (1959). In *Williams*, a non-Indian operating a general store on the Navajo reservation filed suit against two Navajo Indians to collect for goods sold on credit. The Supreme Court ruled that to grant adjudicatory jurisdiction to Arizona courts would undermine the authority of tribal courts and infringe on the right of Indians to govern themselves. *Id.* at 223.

17. *Ghahate*, 80 N.M. at 99, 451 P.2d at 1003 (citing *Williams*, 358 U.S. at 223).

18. *Id.* at 100, 451 P.2d at 1004.

Third, the court addressed the whether federal law pre-empted New Mexico's income tax on reservation Indians. The appellants first claimed that the Wheeler-Howard Act,[19] which provides for self-government of Indian tribes, pre-empted the state's imposition of the income tax.[20] The court found, however, that the tax did not interfere with rights reserved under the Act.[21] The appellants also claimed that the application of the tax impaired a right reserved under the Indian Commerce Clause,[22] which authorizes Congress to regulate commerce with the Indian tribes.[23] The court dismissed this claim, reasoning that the income tax did not involve commerce in any way.[24] Appellants based their final pre-emption contention on *Warren Trading Post Co. v. Arizona State Tax Commission*.[25] The *Warren* court held that Arizona could not impose a gross proceeds tax on sales of an Indian trader on the reservation, stating, "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."[26] The *Ghahate* court reasoned that since there were no comprehensive federal guidelines on state taxation of Indian income, federal law did not pre-empt state authority on the matter.[27]

Finally, the court addressed whether the state has the authority to impose income taxes on Indians living on the reservation. Appellants claimed that New Mexico's constitution contains a disclaimer[28] which prohibits the state from taxing Indian income earned on the reservation.[29] The provision is a disclaimer of all right, title and interest to Indian lands.[30] The *Ghahate* court reasoned that the disclaimer did not preclude an income tax derived from the lands, but only a tax directly on reservation property.[31]

The New Mexico Court of Appeals later reversed the *Ghahate* decision in *Fox v. Bureau of Revenue*.[32] In deciding *Fox*, the court relied on the U.S. Supreme Court decision in *McClanahan v. Arizona State Tax Commission*.[33] Before analyzing *Fox*, it is helpful to first discuss *McClanahan*,

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19. 25 U.S.C. §§ 476-477 (1964).

20. *See* Your Food Stores, Inc. (NSL) v. Village of Espanola, 68 N.M. 327, 331-32, 361 P.2d 950, 953-54 (1961) (indicating that the Wheeler-Howard Act may prohibit the operation of state law over Indians.).

21. *Ghahate*, 80 N.M. at 100, 451 P.2d at 1004.

22. U.S. CONST. art. I, § 8, cl.3.

23. *Ghahate*, 80 N.M. at 100, 451 P.2d at 1004.

24. *Id.*

25. 380 U.S. 685 (1965).

26. *Id.* at 690.

27. *Ghahate*, 80 N.M. at 101, 451 P.2d at 1005.

28. N.M. CONST. art. XXI, § 2. The provision concerns a disclaimer on the part of New Mexico concerning Indian lands. The New Mexico Supreme Court has held that this is a disclaimer of a proprietary rather than a governmental interest. *Ghahate*, 80 N.M. at 101, 451 P.2d at 1005.

29. *Ghahate*, 80 N.M. at 101, 451 P.2d at 1005.

30. *Id.*

31. *Id.* at 101-02, 451 P.2d at 1005-06. The parties stipulated: "neither title, right of possession, nor control of any of the tribal lands . . . are drawn into question." *Id.*

32. 87 N.M. 261, 263, 531 P.2d at 1234, 1236 (Ct. App.), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975), *cert. denied*, 424 U.S. 933 (1976), *overruled by* New Mexico Taxation and Revenue Department v. Greaves, 116 N.M. 508, 864 P.2d 324 (Ct. App. 1993).

33. 411 U.S. 164 (1973).

in which the Supreme Court held that Arizona could not impose an income tax on reservation Indians.[34]

B. *The U.S. Supreme Court Speaks: Federal Law Prohibits State Taxation of Reservation Indians*

In *McClanahan v. Arizona State Tax Commission*,[35] the U.S. Supreme Court held that the State of Arizona lacked jurisdiction to impose a tax on the income of Navajo Indians who lived and worked on the reservation.[36] The Supreme Court addressed sovereignty, pre-emption, and infringement in reaching its conclusion.

The *McClanahan* court first explained that the Indian sovereignty doctrine existed from the earliest days of the U.S. government, when Indians were largely permitted to govern themselves free from state interference.[37] The Court noted, however, that the trend in interpreting the sovereignty doctrine had shifted away from the presumption of tribal sovereignty as a bar to state jurisdiction towards reliance on federal pre-emption.[38] For example, the sovereignty doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community.[39]

The *McClanahan* court, in its pre-emption analysis, rejected Arizona's claim that state law did not preclude state jurisdiction over Indian income. The Court stated that, "[i]n such a situation, the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself."[40] The Court regarded the Buck Act[41] as proof of Congress' unequivocal intent to provide a state income tax exemption for reservation Indians.[42] The Court reasoned that because Congress provided a tax exemption for reservation Indians, the states retained no residual authority to impose an income tax on such individuals.[43] The Court further noted that "state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply."[44] The Court therefore held that the state income tax was pre-empted as it interfered with matters which the relevant statutes leave to the exclusive authority of the federal government and the Indians themselves.[45]

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34. *Id.*

35. 411 U.S. 164 (1973). In *McClanahan*, Arizona attempted to impose a personal income tax on a Navajo Indian working exclusively on the Navajo reservation. *Id.* at 165-66.

36. *Id.* at 167-181.

37. *Id.* at 170.

38. *Id.* at 172.

39. *Id.* at 171.

40. *Id.* at 181.

41. 4 U.S.C.S. §§ 105-110. The Act grants states general authority to impose an income tax on residents of federal areas but expressly provides an exception for Indians on Indian reservations. The statute draws no distinction between member and non-member Indians. *See* Buck Act, 4 U.S.C.S. § 109.

42. *McClanahan*, 411 U.S. at 176.

43. *Id.* at 177.

44. *Id.* at 170-71.

45. *Id.* at 165.

The *McClanahan* court then applied an infringement analysis, addressing the State's contention that because the state tax was on individual Indians rather than the Navajo Nation or reservation, the state had not infringed on tribal self-government.[46] Although the Court felt that the *Williams* infringement test did not apply in this situation,[47] it recognized and rejected the state's claim.[48] The Supreme Court reasoned that since "appellant is an Indian and since her income is derived wholly from reservation sources," her activity was totally within the sphere of federal and tribal jurisdiction.[49] The *McClanahan* court rejected the state's contention that it is irrelevant whether the income tax infringes on individual rights. Instead, the court ruled that although Congress typically deals with tribes as collective entities, the tribes are composed of individuals and the Buck Act conferred individual rights.[50] The *McClanahan* court concluded that the "appellant's rights as a *reservation Indian* were violated when the state collected a tax from her which it had no jurisdiction to impose."[51] Shortly after the decision in *McClanahan*, the New Mexico Court of Appeals decided the issue presented in *Fox v. Bureau of Revenue*.[52]

C. *New Mexico Follows the U.S. Supreme Court and Overturns Ghahate*

Fox v. Bureau of Revenue[53] presented, for the first time in New Mexico, the issue of whether a non-member Indian working on the reservation was a "reservation Indian" for state tax purposes.[54] In deciding *Fox*, the court of appeals addressed the plaintiff taxpayer as a non-member reservation Indian.[55] In comparing the facts of *Fox* to the facts of *McClanahan*, the Court of Appeals recognized tribal affiliation as the only significant difference.[56] *McClanahan* involved a Navajo working on the Navajo Reservation and the taxpayer in *Fox* was a Comanche working on the Navajo Reservation. In applying the *McClanahan* rationale, the *Fox* court focused on the coalescence of status (Indian) and situs (res-

46. *Id.* at 179.

47. *Id.* Cases applying the *Williams* test typically involved situations involving non-Indians and tribal affairs, in which both the state and tribe have interests in asserting jurisdiction. In *McClanahan*, non-Indians were not involved.

48. *Id.* at 181.

49. *Id.* at 179.

50. *Id.* at 181.

51. *Id.* (emphasis added).

52. 87 N.M. 261, 531 P.2d 1234 (Ct. App.), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975), *cert. denied*, 424 U.S. 933 (1976), *overruled by* New Mexico Taxation and Revenue Department v. Greaves, 116 N.M. 508, 864 P.2d 324 (Ct. App. 1993).

53. *Id.* In *Fox*, the New Mexico Bureau of Revenue attempted to deny the refund of income tax imposed on a Comanche Indian, who resided and worked on the Navajo Indian Reservation. The taxpayer was not enrolled in the Navajo tribe. *Id.*

54. *Id.* at 262, 531 P.2d at 1235.

55. *Id.* at 261, 531 P.2d at 1234. This approach differed from the method used in *Ghahate v. Bureau of Revenue*, 80 N.M. 98, 451 P.2d 1002 (Ct. App. 1969), in which the court of appeals did not distinguish between member and non-member Indians. *See supra* notes 8-31 and accompanying text.

56. *Fox*, 87 N.M. at 261-62, 531 P.2d at 1234-35.

ervation).[57] The court cited language in *McClanahan* which stated, "[T]he tax is therefore unlawful as applied to *reservation Indians* with income derived wholly from reservation resources."[58] The Court of Appeals expressly noted that there was no case law finding that tribal affiliation was crucial where an Indian was on the reservation of another tribe.[59]

The *Fox* court reviewed both criminal and civil jurisdiction for guidance in determining the definition of a reservation Indian.[60] In regard to determining jurisdiction for criminal purposes, the court noted that the U.S. Supreme Court, in discussing the Major Crimes Act,[61] had defined a reservation Indian as including Indians committing the offense on the reservation who "belong to that or some other tribe."[62] In addition, the *Fox* court cited *State v. Begay*,[63] in which the New Mexico Supreme Court held that the state did not have jurisdiction over an Indian driving an automobile on the Navajo reservation.[64] The *Fox* court noted that in *Begay* "there was no mention of tribal affiliation, status as Indian and situs on a reservation having been shown."[65]

The *Fox* court also focused on a New Mexico civil case in which no distinction was drawn between member and non-member Indians. In *Valdez v. Johnson*,[66] the New Mexico Supreme Court upheld exclusive tribal jurisdiction for a civil dispute arising on the reservation between two Indians.[67]

After reviewing the existing case law, the *Fox* court concluded that once status as an Indian and situs on the reservation was shown, tribal affiliation was of no importance in determining the status of reservation Indians.[68] In addressing the "assimilated in the general community"

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57. *Id.* at 262, 571 P.2d at 1235.

58. *Id.* (citing *McClanahan*, 411 U.S 164, 165 (1973)). *See also* O'Cheskey v. Hunt, 85 N.M. 388, 512 P.2d 961 (1973). In *O'Cheskey*, the New Mexico Supreme Court quashed a writ of certiorari, holding that for the state to impose its income and gross receipts tax on reservation Indians working solely within the reservation would interfere with matters left to the federal government and the Indians themselves. *Id.*

59. *Fox*, 87 N.M. at 262, 531 P.2d at 1235.

60. *See* United States v. Kagama, 118 U.S. 375 (1885) (Indian committing crime on a reservation other than own tribe's reservation is still under federal jurisdiction of Major Crimes Act.); State v. Begay, 63 N.M. 409, 320 P.2d 1017 (1958) (state did not have jurisdiction over an Indian driving an automobile on the Navajo without mention of tribal affiliation).

61. 18 U.S.C. § 1153 (1984). The Major Crimes Act enumerates 14 crimes which, if committed by an Indian against another Indian or non-Indian, grants exclusive jurisdiction to the federal courts. The definition of an Indian under the Major Crimes Act is a person with some degree of Indian blood and is recognized as Indian by an Indian tribe or by the federal government. *See* United States v. Torres, 733 F.2d 449 (1984); *See generally* 18 U.S.C. § 1153.

62. *Fox*, 87 N.M. at 262, 531 P.2d at 1235. (quoting United States v. Kagama, 118 U.S. 375 (1885)). Furthermore, a taxpayer's status an Indian and situs on the reservation creates jurisdiction to extradite. *Id.* (citing Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970)).

63. 63 N.M. 409, 320 P.2d 1017 (1958).

64. *Fox*, 87 N.M. at 263, 531 P.2d at 1236.

65. *Id.* (citing *Begay*, 63 N.M. 409, 320 P.2d 1017.)

66. 68 N.M. 476, 362 P.2d 1004 (1961). Both plaintiff and defendant were residents of the Isleta Pueblo, although both were not members. The opinion made no mention of tribal affiliation.

67. *Fox*, 87 N.M. at 263, 531 P.2d at 1236. (citing *Valdez*, 68 N.M. 476, 362 P.2d 1004 (1961); *Begay*, 63 N.M. 409, 320 P.2d 1017 (1958)).

68. *Id.*

doctrine described in *McClanahan*, the *Fox* court interpreted the doctrine to require something more than living on other reservations.[69] The court therefore held that the taxpayer's status, although working on another tribe's reservation, was that of a "reservation Indian" within the meaning of the *McClanahan* decision and thus the taxpayer was exempt from the New Mexico Bureau of Revenue's income tax.[70]

D. Other Jurisdictions Prohibit Taxation of Non-member Indians

Other state courts have faced the issue of taxing non-member reservation Indians, and most have found a lack of state authority to impose income taxes. The Supreme Court of North Dakota, in *White Eagle v. Dorgan*,[71] held that Indian income earned on the reservation was not subject to state taxation.[72] In deciding the issue, the court treated all the taxpayers as reservation Indians, despite the fact that one was not a member of the tribe for which he was working.[73] The *White Eagle* court reasoned, consistent with *McClanahan*, that in the absence of an agreement by the Indians residing on the reservation accepting North Dakota's power to impose income tax on them, the state has no jurisdiction to do so.[74]

Idaho considered the issue of non-member Indian taxation in *In Re Mehojah*.[75] The Idaho Board of Tax Appeals reasoned that the power to tax, or not to tax, is one of the most important attributes of tribal sovereignty, and the imposition of a state tax would constitute a usurpation of that function, even where a non-member is involved.[76]

The Montana Supreme Court addressed the narrow issue of whether the state could tax a non-member Indian's income derived from reservation resources in *Boxer v. State*.[77] The court looked to *McClanahan* for guidance and properly applied the Supreme Court's reasoning to an income tax involving a non-member Indian working on the reservation.[78] In reaching its conclusion that the state may not tax such an income, the court stated the primary factor in limiting state jurisdiction is whether the activity occurred in "areas set aside by treaty for the exclusive use

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69. *Id.* (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).

70. *Id.*

71. 209 N.W.2d 621 (N.D. 1973). *Dorgan* involved four Indian taxpayers residing on the Standing Rock Indian Reservation, three of which were Standing Rock Sioux tribal members, the fourth of which was a member of another tribe. *Id.* at 622.

72. *Id.* at 624.

73. *Id.* at 622-23.

74. *Id.* at 623.

75. No. 73-1-27, 1974 WL 21924 (Idaho Bd. Tax App. 1974). The facts involved a Kaw Indian from Oklahoma working for the Shoshonee-Bannock Tribe on the Fort Hall Reservation in Idaho. *Id.* at *1.

76. *Id.* at *3.

77. 583 P.2d 1059 (Mont. 1978). Boxer was a Chippewa Indian not enrolled in any tribe. His wife is an enrolled member of the Assiniboine-Sioux Tribes of the Fort Peck Reservation. They lived on the Fort Peck Reservation in 1968 and Boxer earned money within the exterior boundaries of the reservation. *Id.* at 1060-61.

78. *Id.* at 1062. The *Boxer* court relied on the pre-emption analysis employed in *McClanahan*. *Id.*

and control of Indians."[79] The *Boxer* court disagreed with the state's contention that the unenrolled status of an Indian denies them the protection of *McClanahan*.[80] The Montana Supreme Court read the phrase "reservation Indian" to mean Indians residing on the reservation, irrespective of their enrollment in the tribe.[81]

IV. ANALYSIS OF THE *GREAVES* DECISION

In *Greaves*, the New Mexico Court of Appeals expressly overruled *Fox*, holding that income earned by Indians on reservations of which they are not tribal members is taxable by the state.[82] Although the court acknowledged that the policy affording American Indian tribes freedom from state control and jurisdiction is "deeply rooted in our nation's history,"[83] it departed from this principle in *Greaves*. In a brief opinion, the court relied on language borrowed from U.S. Supreme Court opinions to justify state taxing authority over the income of non-member Indians working on a reservation. However, the *Greaves* court failed to present any cogent reasoning to support its conclusion. Most importantly, the court failed to recognize a Congressional amendment which effectively overturned the United States Supreme Court's *Duro v. Reina* decision,[84] a case on which the court of appeals relied in reaching its conclusion in *Greaves*. Moreover, the decision in *Greaves* reveals the court's misapprehension of the demographic realities of Indian communities.

In *Greaves*, the court of appeals determined that the *Fox* decision was based on a misinterpretation of federal law.[85] The *Fox* court read *McClanahan* to mean the state has no jurisdiction to tax Indian income earned on the reservation, regardless of tribal affiliation.[86] By piecing together U.S. Supreme Court dicta, the *Greaves* court determined its previous reading of *McClanahan* to be mistaken.[87]

A. *Sac and Fox: Absent Express Congressional Authorization, States Do Not Have Jurisdiction to Tax Tribal Members Who Live and Work in Indian Country*

The *Greaves* opinion quotes language from *Oklahoma Tax Commission v. Sac and Fox Nation*[88] which states, "[*McClanahan* held] a state was

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79. *Id.* at 1063 (quoting *McClanahan*, 411 U.S. at 176).

80. *Id.*

81. *Id.* at 1064. The court cited to the New Mexico Court of Appeals' decision in *Fox* when it reasoned that situs on the reservation and status as an Indian is sufficient for exemption from state income tax. *Id.* The *Boxer* court found no cases in which the enrolled status of an Indian was crucial. *Id.*

82. New Mexico Taxation and Revenue Department v. Greaves, 116 N.M. 508, 509, 864 P.2d 324, 325 (Ct. App. 1993).

83. Rice v. Olson, 324 U.S. 786, 789 (1945).

84. 495 U.S. 676 (1990). This case was overturned by Defense Appropriations Act for Fiscal Year 1991, Pub. L. No. 101-511, § 8077(b), 104 Stat. *1856*, 1892 (codified as amended at 25 U.S.C. § 1301(2) (1990)) [hereinafter 1991 Defense Appropriations Act].

85. *Greaves*, 116 N.M. at 509, 864 P.2d at 325. The court reasoned that, based on recent U.S. Supreme Court decisions, it had misinterpreted *McClanahan* as applying to non-member Indians. *Id.*

86. *Id.* (citing *Fox*, 87 N.M. at 262-63, 531 P.2d at 1235-36).

87. *Id.*

88. 113 S. Ct. 1985 (1993). Sac and Fox Tribe sought a permanent injunction barring the

without jurisdiction to subject *a tribal member* living on the reservation, and whose income derived from reservation sources, to a State income tax absent an express authorization from Congress."[89] Without providing any reasoning, the *Greaves* court offers the Supreme Court dicta as support for the notion that *Sac and Fox* excludes tribal members working on a reservation from a state income tax exemption. The issue before the *Sac and Fox* court, however, was solely whether the state could tax members of the Sac and Fox Nation. Since the narrower issue of whether the state could tax members of other tribes working on the Sac and Fox reservation was not before the Supreme Court, it is not clear why the *Greaves* court regards the language as supportive of its conclusion. The Supreme Court in *Sac and Fox* held, consistent with *McClanahan*, that "absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country."[90] The *Greaves* court does not cite to any authority where Congress grants New Mexico jurisdiction to impose an income tax on the reservation.

B. Cigarette Tax as a Basis For Income Tax

The *Greaves* court also extracts language from *Washington v. Confederated Tribes of the Colville Indian Reservation*[91] [hereinafter *Colville*] which states, "[F]ederal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt [the state of] Washington's power to impose its taxes on Indians not members of the Tribe."[92] The opinion cites the language without providing a nexus between a tax on cigarettes and a tax on reservation income. The *Greaves* court's assumption that the quote applies to income taxes runs counter to other language in *Colville*. For example, the U.S. Supreme Court's opinion in *Colville* also states, "[T]he Washington Enabling Act reflects an intent that the State not tax reservation lands or income derived therefrom . . . ."[93] The Supreme Court distinguished the cigarette tax as a transaction concerning personalty with no substantial connection to reservation lands,[94] yet the court of appeals in *Greaves* reads the language as Supreme Court approval of a income tax on reservation Indians.

C. Duro Overturned by Amendment—No Recognition in Greaves

In *Greaves*, the court of appeals quoted U.S. Supreme Court language which appears to resolve the issue of whether *McClanahan* applies to

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Oklahoma Tax Commission from taxing the income of its members. The court held that absent explicit direction to the contrary, the state did not have the authority to impose such a tax. *Id.* at 1993.

89. *Greaves*, 116 N.M. at 509, 864 P.2d at 325 (quoting *Sac and Fox*, 113 S. Ct. at 1990).

90. *Sac and Fox*, 113 S. Ct. at 1993.

91. 447 U.S. 134 (1980). This case involved Washington's imposition of a sales tax on cigarettes and other personal property from transactions occurring on the reservation. *Id.*

92. *Greaves*, 116 N.M. at 509, 864 P.2d at 325 (quoting *Colville*, 447 U.S. at 160).

93. *Colville*, 447 U.S. at 156 (citations omitted).

94. *Id.*

non-member Indians. However, a juxtaposition of the quote with the reasoning of the Supreme Court decision reveals two exceptions which would apply to a tribal judge working on the reservation. Most detrimental to the *Greaves* opinion is the Court of Appeals' failure to recognize an amendment to the Indian Civil Rights Act which overturns the decision.

The Supreme Court in *Duro v. Reina*[95] held that tribes do not retain criminal jurisdiction over minor crimes involving non-member Indians. The *Greaves* court relied primarily on a quote from *Duro* which states that the *McClanahan* decision "does not apply to taxation of non-members, even where they are Indians."[96] Although the quote is seemingly clear, the context from which the quote is removed does not support an income tax on a tribal judge's income. The Supreme Court's concern in *Duro* was the assertion of tribal authority over non-members who cannot participate in the tribal government.[97] The *Duro* court also recognized "broader retained tribal powers outside the criminal context" such as civil jurisdiction over non-members.[98] The Court noted that the civil authority over non-members typically arises from "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[99]

The conclusion that *Greaves*, as a non-member Indian, may be taxed is inconsistent with the Supreme Court's reasoning in *Duro*. Working under contract as the Chief Judge of the Jicarilla tribal court, Greaves not only played a significant role in tribal affairs but also worked under a consensual relationship with the tribe: two factors which grant exclusive tribal authority over non-members. Not only did the *Greaves* court extract the *Duro* language out of context, it revealed no awareness of the Congressional amendment which overturned the Supreme Court's *Duro* decision.

Shortly after the *Duro* decision, Congress passed an amendment to the Indian Civil Rights Act ("Act")[100] to correct the Court's reading of Congressional intent regarding the scope of tribal and federal power and thus, to overturn *Duro*.[101] The failure to reconcile the amendment's effect with the language the *Greaves* court borrows from the *Duro* opinion,

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95. 495 U.S. 676 (1990). Duro was a Mission Indian who shot and killed a Salt River Pima-Maricopa Indian on the Salt River Reservation. The Supreme Court ruled that the Salt River Tribe did not have misdemeanor jurisdiction over Duro. *Id.* at 679.

96. *Greaves*, 116 N.M. at 509, 864 P.2d at 325 (quoting *Duro*, 495 U.S. at 686-87).

97. *Duro*, 495 U.S. at 688. The court noted that there was no evidence that non-members have a say in tribal affairs or significantly share in tribal disbursements. *Id.* at 687 (quoting *Colville*, 447 U.S. at 161).

98. *Id.*

99. *Id.* at 688 (quoting Montana v. United States, 450 U.S. 544, 565 (1981).

100. 25 U.S.C. §§ 1301-1341.

101. *See* Hopi Tribe v. Manycow, 21 ILR 6080 (Hopi Tr. Ct., May 25, 1994) (holding that *Duro* is no longer good law after the enactment of the 1991 Defense Appropriations Act, Pub. L. 101-511, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified as amended at 25 U.S.C. § 1301(2) (1990) (reaffirming the authority of Indian tribes to exercise jurisdiction over non-member Indians); Mousseaux v. United States Commissioner of Indian Affairs, 806 F. Supp. 1433 (1992) (holding that Congress intended the amendments to nullify the *Duro* decision and that the statute must be given a retroactive effect).

creates a void in the court's analysis. Congress amended the Act's definition of "powers of self-government" to read: "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians."[102] The amendment also adds a definition of the term "Indian" which is determinative of Congress' intent to clarify the scope of tribal and federal power in other jurisdictional disputes, and should not be limited to the exercise of criminal jurisdiction.[103] The amendment clearly draws a line between Indians and non-Indians with respect to tribal and federal jurisdiction, and not between members and non-members. Indeed, when Congress amended the *Duro* decision, the Conference Committee Report left little doubt regarding the impetus for change. The Report states, "Congress has recognized that tribal governments afford a broad array of rights and privileges to non-tribal members."[104] Examples the Report referred to include non-tribal member Indians owning property on Indian reservations, their children attending tribal schools, and their families receiving health care from tribal hospitals and clinics.[105] Federal programs and services are provided to Indian people because of their status as Indians without regard to whether their tribal membership is the same as their reservation residence. The Report clearly states, "[t]he issue of who is an Indian for purposes of Federal law is well-settled as a function of two hundred years of Constitutional and case law and Federal statutes."[106]

An application of the *Duro* amendment to a reading of *McClanahan*[107] would result in a preclusion of state income tax authority over all Indians who work and reside on a reservation, not merely those who are members of the tribe. In holding that reservation Indians are exempt from state taxation, the *McClanahan* court considered the fact that appellant was an Indian and that her income was derived wholly from reservation resources.[108] The *Duro* amendment not only overturns the Supreme Court decision, it buttresses the *McClanahan* rationale that Indian taxing authority remains solely with federal and tribal governments. However, the

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102. 1991 Defense Appropriations Act, Pub. L. No. 101-511, § 8077(b) 104 Stat. *1856*, 1892 (1990) (codified as amended at 25 U.S.C. § 1301(2) (1990)). Congress' purpose was to rectify a jurisdictional void. According to the Conference Committee Report accompanying Public Law 101-511, "those who identify themselves as Indian and are recognized under Federal Law as Indian, may come onto an Indian reservation, commit a criminal misdemeanor, and know that there is no governmental entity that has the jurisdiction to prosecute them for their criminal acts." H. Rep. No. 938, 101st Cong. 2d Sess. 132 (1990). Congress, in plain language, overturned the result of *Duro* in the definition of "powers of self-government." Congress took further action, however, to resolve the dispute of "who is an Indian?" by adding the definition of Indian and clearly drawing the line between Indian and non-Indian.

103. "'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301(4).

104. H. Rep. No. 938, 101st Cong., 2d Sess. 132 (1990).

105. *Id.*

106. *Id.*

107. 411 U.S. 164 (1973).

108. *McClanahan*, 411 U.S. at 179.

New Mexico Court of Appeals failed to recognize the amendment in ruling on *Greaves*.

Furthermore, the *Greaves* court disregarded the standards of constructing taxing laws applicable to Indians. The Supreme Court in *Montana v. Blackfeet Tribe of Indians*[109] stated that "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."[110] The Court stated one canon as "states may tax Indians only when Congress has manifested clearly its consent to such taxation."[111] In articulating the principle, the Court did not distinguish between Indians and member Indians. Congress' decision to include all Indians within the scope of federal and tribal authority should be given credence by all courts, as the Supreme Court often defers to Congress' intent.[112]

V. IMPLICATIONS

The New Mexico Court of Appeals' decision in *Greaves* will egregiously affect New Mexico's Indian population. New Mexico's twenty-two Indian communities do not constitute homogeneous groups of tribal members. Indian people living on reservations include Bureau of Indian Affairs and Indian Health Services employees, Indians who have married a member of another tribe and their offspring, and increasing numbers of Indians who reside on and work on other reservations.[113] Furthermore, the Indian Child Welfare Act[114] provides placement preferences in the adoptions of Indian children to members of the Indian child's extended family, Indian foster homes, or other Indian organizations. The logical result of these preferences is that many Indian children will be placed on reservations of tribes other than the tribe in which they are eligible to be enrolled. A state income tax on non-member Indians working on a reservation creates a disservice to tribal governments without a balance of providing services to the tribes. The *Greaves* decision allows New Mexico to collect revenue from Indians in which the state has no interest. After the *Duro* amendment, the state retains no criminal jurisdiction, nor is the state likely to provide health, education, or other social services to reservation Indians. The existence of New Mexico's twenty-two Indian communities creates some employment opportunities for Indians. However, the state income tax on non-members disenfranchises reservation Indians from seeking employment on other reservations because the tax increases the strains on already low-paying tribal jobs. The tribal employer will have to compensate for the state income tax which further depletes

109. 471 U.S. 759 (1985).

110. *Id.* at 766 (quoting Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985)).

111. *Id.* (citing Bryan v. Itasca County, 426 U.S. 373 (1976)); *see also* Carpenter v. Shaw, 280 U.S. 363, 365-66 (1930).

112. *See* Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956).

113. *See generally* Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts Over Non-member Indians*, 38 FED. B. NEWS AND J. 70.

114. 25 U.S.C. §§ 1901-1963 (1978).

limited tribal resources. The formidable social problems of poverty, unemployment, and undereducation on New Mexico's Indian communities will only increase as a result of *Greaves*.

VI. CONCLUSION

In its soundly reasoned *Fox* decision, the New Mexico Court of Appeals originally disapproved of the state imposing an income tax on nonmember reservation Indians. In *Fox*, the Court of Appeals correctly recognized that the coalescence of status as an Indian and situs on the reservation was sufficient to create an exemption from state taxation. However, in *Greaves*, the court took a more parsimonious position on the scope of tribal and federal power and allowed the state to tax a reservation Indian working as a tribal judge. The court of appeals unfortunately relies on language borrowed from a Supreme Court opinion which was overruled by Congress. The *Greaves* decision reveals the New Mexico Court of Appeals' unawareness of the *Duro* amendment and a misunderstanding of the parameters of tribal sovereignty.

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