No. 02 464 SEP 18 2002

In The
Supreme Court of the United States

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Petitioner,

v.

FLAT CENTER FARMS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal law preempts assessment of the Montana state corporation license tax on a Montana business corporation doing business within the Fort Peck Indian Reservation on the grounds that such assessment is presumed preempted absent express Congressional authorization, that the enrollment status of one of the corporation's Indian shareholders is shared by the corporation, and that the corporation is not "carrying on business in" the State of Montana?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue a writ of certiorari to review the opinion and judgment of the Montana Supreme Court entered on June 21, 2002.

OPINIONS AND ADMINISTRATIVE ORDERS BELOW

The Supreme Court of the State of Montana is the court of last resort in Montana. The Court filed its Opinion on June 21, 2002, reported at *Flat Ctr. Farms, Inc., v. Dep't of Revenue*, 2002 MT 140, 310 Mont. 206, 49 P.3d 578. (App. 1-23). The Montana Fifteenth Judicial District Court, Roosevelt County, filed its unreported Order Granting Petitioner's Motion for Summary Judgment on March 30, 2000. (App. 24-27.) The State Tax Appeal Board (STAB) of the State of Montana filed its unreported Findings of Fact, Conclusions of Law, Order and Opportunity for Judicial Review on July 19, 1999. (App. 28-40.) The Montana Department of Revenue issued its unreported Final Agency Decision on July 17, 1998. (App. 41-45.)

JURISDICTION

The Montana Supreme Court judgment sought to be reviewed was entered on June 21, 2002. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C.A. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, section 8, clause 3, of the United States Constitution (the Indian Commerce Clause) provides that Congress has the authority:

> To regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes.

Article VI, clause 2, of the United States Constitution (the Supremacy Clause) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

28 U.S.C.A. § 1257 provides in pertinent part that:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

Section 15-31-101 of Montana Code Annotated (1993) provides in pertinent part that:

> (1) The term "corporation" includes associations, joint-stock companies, common-law trusts and business trusts which do business in an organized capacity, and all other corporations whether created, organized, or existing under and pursuant to the laws, agreements, or declarations of trust of any state, country, or the United States.
>
> (2) The terms "engaged in business" and "doing business" both mean actively engaging in any transaction for the purpose of financial or pecuniary gain or profit.
>
> (3) Except as provided in 15-31-103 or 33-2-705(4) or as may be otherwise specifically provided, every corporation engaged in business in the state of Montana shall annually pay to the state treasurer as a license fee for the privilege of carrying on business in this state such percentage or percentages of its total net income for the preceding taxable year at the rate hereinafter set forth.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The case below was decided on stipulated facts, which were incorporated verbatim in the STAB decision. (App. 29, App. 30.) Prior to 1993, Kim Murray conducted his

farming operations as an individual and his individual income was not taxed by Montana. (Stipulated Facts, ¶ 8; App. 30.)[1] Kim and Denise Murray, husband and wife, own the corporate stock in equal shares. (App. 29.) Mr. and Mrs. Murray are both Indians, though only Mr. Murray is an enrolled member of the Fort Peck Tribes, the Reservation on whose lands the shareholders are resident and the corporation conducts its business. (App. 29.)

In 1993, Kim Murray made the business decision to incorporate his farming operation as Flat Center Farms, Inc. (D.C. Doc. 7 at 2.) The corporation tax year in issue is 1993-94. In 1996, Mr. Murray appeared before the tribal council and asked for tribal council "incorporation," obtaining a resolution "approving" Flat Center Farms, Inc. as a tribal corporation "to avoid being taxed by the State of Montana" (D.C. Doc. 3; STAB Doc. 7, Ex. B.) There are no facts in the record regarding whether the Fort Peck Tribes tax this private corporation. The Tribes were not a party to any proceeding below.[2] There are no facts on the record regarding any other connection between the corporation and the Tribe other than that the corporate operations are located on the Reservation, one of its shareholders is an enrolled tribal member, and some of the land leased by the

[1] Montana did not seek to tax Mr. Murray's individual income under *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (a state may tax the income of all of its residents, regardless of the situs of the activity generating the income, but it cannot tax enrolled tribal members residing outside the state's taxing jurisdiction in Indian Country).

[2] The Tribes filed an amicus curiae brief in support of Flat Center in the Montana Supreme Court.

corporation is land owned by the Tribe, some being trust land. (App. 29, 30.)

On July 12, 1996, the Montana Department of Revenue (Petitioner) issued a Notice of Assessment to Respondent pursuant to the Montana corporation license tax and interest provisions for the tax year ending October 31, 1994. On August 8, 1996, Respondent protested the assessment, asserting immunity from state taxation because the shareholders are Indians and the corporate operations are on the reservation and seeking final agency review by the Petitioner's Director. (App. 41-45.) In the Department's July 20, 1998 final agency decision, the Director affirmed the assessment on the grounds that "[Flat Center] is a Montana corporation incorporated under the laws of Montana, and doing business within the State of Montana." (App. 42.) "While the shareholders of this corporation are enrolled members of an Indian tribe and exempt from Montana income tax, the corporation is neither a Native American nor an enrolled member of any Indian tribe." (App. 43.)

Respondent appealed the Director's decision to the STAB on the stipulated facts. (App. 29, 30.) The STAB upheld the Director's decision on the basis that "a corporation is a separate entity from its creators, owners or shareholders" and that "incorporation is a business decision which carries with it certain benefits to the incorporator, including some degree of protection from legal action against its shareholders, directors, etc. and some tax and financial advantages." (App. 38.) The STAB further noted that the private corporation was not created to promote tribal interests, but rather was stipulated to have been created for the sole purpose of farming as a for-profit

corporation. It noted that the recognition of the corporation by the Tribes was no more than a recognition of its existence as a corporate entity. (App. 38.)

Respondent appealed to the Montana district court, again claiming exemption from state taxation because of immunities and privileges under federal law arising from the Indian status of the shareholders and the location of the business operation. The Petitioner defended the assessment on the basis of federal corporate and Indian law. The district court summarily reversed the STAB. In a three-page opinion, the Montana district court held that the tax status of the corporation was to be determined from the record as a whole and that the primary factor in determining taxability of a corporation is the situs of the activity being taxed, not just the status of the individual as enrolled or non-enrolled. (App. 25.) The district court concluded that the determinative facts were that the operations were on the reservation and the beneficiaries of the corporate business were Indians. The Montana Supreme Court upheld the district court opinion based on an erroneous interpretation of federal Indian preemption principles. (App. 1-23.)

II. PRESENTATION AND PRESERVATION OF FEDERAL QUESTIONS

A. The Parties Asserted Federal Questions in Each Level of Review, and the Court's Decision is Based on Its Erroneous Interpretation of Federal Law.

This Court has jurisdiction to review and reverse the Montana court decision, which directly conflicts with the United States Court of Appeals for the Sixth Circuit, the

court of last resort for the state of North Dakota, and several decisions of this Court. Respondent asserted its challenge to the tax assessment on the basis of federal law in each level of appeal from the agency assessment to the Montana Supreme Court. Petitioner defended the tax on the basis of federal law and the Montana Supreme Court ruled on the basis of its erroneous interpretation of this important issue of federal law.

Respondent's initial appeal before the STAB asserted: "It is well settled in the United States that individual income earned by an Indian person and derived wholly from reservation sources is exempt from state taxation," citing *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). (App. 58.) Respondent also relied on the Montana Supreme Court's decision in *LaRoque v. State of Montana*, 178 Mont. 315, 583 P.2d 1059 (1978), which had acknowledged the primacy of federal law. (App. 58.) ("The principle of *McClanahan* is thus controlling. . . . " *LaRoque*, *supra* at 322).

Petitioner asserted before the STAB that the Respondent is voluntarily incorporated in Montana and the corporation is separate from its shareholders for taxation purposes, relying on *Moline Properties v. Commissioner of Internal Revenue*, 319 U.S. 436 (1943). (App. 55.) Respondent is, therefore, a non-Indian for purposes of the federal Indian preemption analysis and there is no federal law bar to its taxation by the state. The Indian status of the shareholders is not relevant to the taxability of the corporation and the situs of the farming operation is not of itself a bar to state taxation. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). (App. 54, 56, 57.) (D.C. Doc. 3; STAB Doc. 8 at 10, 11.)

The Petitioner further argued that under several of this Court's decisions, "state laws may be applied [on Indian reservations] unless such application would interfere with reservation self-governance or would impair a right granted by federal law. . . ." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) and that Respondent had stipulated to no facts relating to tribal sovereignty other than the situs of the farming business. (App. 56, 57.)

The STAB affirmed the assessment on the basis that Respondent "is a separate legal entity from its creators, owners or shareholders," "does not have status as an individual Indian," and that Respondent's income is subject to the state corporation license tax pursuant to Montana Code Annotated § 15-31-101 (1993). (App. 38.)

In the petition for judicial review of the STAB's decision before the Fifteenth Judicial District, Roosevelt County, Respondent moved for summary judgment relying on, inter alia, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973) and *LaRoque*, *supra*. (D.C. Doc. 7.) Before the district court, Petitioner raised the same federal questions it had raised before the STAB. (App. 51-53.)

The district court reversed the STAB's decision, concluding that the "situs of the activity is the primary factor in determining whether state taxation jurisdiction exists, not the status of the individual as enrolled or non-enrolled," *citing LaRoque v. State of Montana*, 178 Mont. 315, 583 P.2d 1059, 1063 (1978). (App. 24-27). The district court relied on a totality test, rejecting as "mere form over substance" the distinction between corporate and Indian

status, observing that "the beneficiaries are Indian, the corporation is recognized as a tribal corporation, and operates wholly within the reservation and on Indian owned lands." *Id.*

The Petitioner appealed the district court decision to the Montana Supreme Court. Its appeal was expressly "limited to questions of federal law;" asserting that "[f]ederal Indian law gives the State the right to impose taxes on nonmembers doing business on reservation land." (App. 47-50.)

The Petitioner asserted that this Court's jurisprudence, including *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), and *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), limits federal preemption from state taxation to "reservation Indians" and "reservation lands," and requires application of a legal incidence test, rather than a beneficiary test, for economic burden of state taxes. The Petitioner contended that: the tax was on corporate income, not "reservation lands;" that the question of federal preemption of state taxes required a particularized inquiry under, inter alia, *Cotton Petroleum*, *supra*, and that Congress had not preempted Montana's authority to impose a tax on non-members doing business on reservation land leased from the tribe, its members, or the United States in its capacity as trustee. *Id.*

Further, the Respondent was not a "reservation Indian" because the Respondent corporation was not an enrolled member of the reservation on which the activity took place, but rather a separate legal entity first incorporated in Montana. Therefore, the state could not be held to be federally preempted from taxing Respondent without a

particularized inquiry into the state tribal and federal interests which the district court on summary judgment had not done. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). *Id.*

The Petitioner also argued that a corporation is taxed separately from its shareholders and that its status did not flow through to the state corporation, citing *Moline Properties v. Commissioner of Internal Revenue*, 319 U.S. 436 (1943), and *Baraga Products, Inc. v. Commissioner of Revenue*, 971 F. Supp. 294 (W.D. Mich. 1997), *aff'd*, 156 F.3d 1228 (6th Cir. 1998), unpublished opinion reported at 1998 U.S. App. LEXIS 17498. (App. 47, 49.)

The Montana Supreme Court concluded that Respondent was exempt from the Montana corporation license tax because "the coalescence of situs (reservation) and status (Indian) which guides the traditional analysis is present." (App. 11.) The Court disregarded the corporate status and treated Respondent as an enrolled tribal member Indian. The Court did not determine where the legal incidence of the tax fell, but instead held that the Indian status of the taxpayer was only one factor relevant to the analysis; that the most important factor is the situs of the activity taxed. The Court held that the State was preempted from taxing activities in Indian country without express Congressional authorization, citing a presumption of interference with the tribal rights of Indians to make their own laws and be governed by them, *citing Williams v. Lee*, 358 U.S. 217, 220 (1959) (App. 6), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). (App. 5.) The Court held that "[t]he exercise of state jurisdiction over activities occurring entirely on Indian lands is an infringement on inherent tribal authority and is contrary to principles of self-government and tribal sovereignty. *Williams v. Lee*,

358 U.S. 217, 220-23, 79 S. Ct. 269, 271-72, 3 L. Ed. 2d 251." (App. 6.) The court rejected this Court's recent rulings and relied on an unworkable and subjective test that should be expressly overruled.

B. There is No Adequate and Independent State Ground Supporting the Decision Below.

1. The Parties' Contentions Were Based on Federal Law.

Before the Montana Supreme Court, Respondent relied on federal law, including primarily *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) and *Mescalero Apache Tribe v. Jones*, *supra*. (App. 46.) The Petitioner unambiguously appealed on the basis of federal law. "The issues here are limited to questions of federal law. . . . " (App. 47.) As noted above, both parties had relied on federal law both before the STAB and the district court.

2. The State Court Decision is Based on the Court's Interpretation of Federal Indian Law.

The Montana court expressly relied on its understanding of federal Indian law in its decision. Where the court's opinion expressly relies on federal law, this Court has jurisdiction to review and reverse the decision. *Washington v. Chrisman*, 455 U.S. 1, 5 n.2 (1982); *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982). The Montana court expressly relied on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831); *Williams v. Lee*, *supra*, and other decisions of this Court for its analysis. (App. 6.) It also relied on its 1978 decision in *LaRoque*, which itself was based

entirely on the court's interpretation of federal law; most importantly, the Buck Act, *McClanahan*, and *Williams v. Lee*, *supra*. (*LaRoque*, *supra*, at 322-25). (App. 9-11.) Thus, the decision below could not be found to rest on adequate state grounds. (*See LaRoque*, inter alia, at 320-25.) *LaRoque* rests on what is now an incorrect interpretation of federal law, which this Court can and should correct. *See* Stern, Gressman, Shapiro, Geller, *Supreme Court Practice* (7th ed. 1993) at 143-52.

The decision below does not cite to any state statutory or other state law that could exempt Respondent from state taxation. The only articulated state law ground is *LaRoque*, a case unquestionably itself founded solely on federal law grounds. Its references to state law are subsidiary and based on its interpretation of federal law. Thus, this Court has jurisdiction to review the decision. Stern, *supra*. To the extent the ruling is based in part on state law, the law is so interwoven as to be inextricable, and the state law grounds are not, therefore, adequate for purposes of defeating this Court's jurisdiction. *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

REASONS THE COURT SHOULD GRANT THE PETITION

SUMMARY OF THE ARGUMENT

The Montana Supreme Court has wrongly decided an important federal issue of an immunity from state taxation of a privately-held Montana corporation doing business on the Fort Peck Reservation in Montana, claimed to arise under the United States Constitution under the Indian Commerce Clause and Supremacy Clause. The

Montana Supreme Court's decision directly conflicts with the decisions of the Court of Appeals of the Sixth Circuit and the court of last resort of the State of North Dakota. It conflicts in several respects more generally with the last two decades of this Court's Indian law jurisprudence. Its ruling creates a subjective and unworkable rule for federal preemption of state taxes on Indian-owned privately-held corporations doing business on reservations within states, and it should be reversed.

The salient errors of federal law in the decision are: (1) the Court disregarded the separate tax status of the corporation which voluntarily incorporated under Montana law, and passed through to the corporation the immunity of one of its shareholders; (2) federal Indian law preemption principles do not apply to preempt state tax authority over non-member or non-resident member Indians; (3) federal Indian preemption principles require a determination of the legal incidence of the tax in question. If the legal incidence falls on a non-member, the Court must further conduct a particularized inquiry whether the federal and tribal interests so outweigh the state interests that preemption of state taxing authority may be implied. Thus, federal preemption may not be implied from mere situs and status alone; and (4) the Court erred as a matter of federal law in holding that Respondent does not "carry on business in this state."

I. THE MONTANA SUPREME COURT DECISION CONFLICTS WITH THE COURT OF APPEALS FOR THE SIXTH CIRCUIT AND COURT OF LAST RESORT IN NORTH DAKOTA IN DISREGARDING THE CORPORATE FORM OF THE TAXPAYER AND EXTENDING THE TAX PRIVILEGES OF THE INDIAN SHAREHOLDER TO THE CORPORATION.

In *Baraga Products Inc. v. Michigan Commissioner of Revenue*, 971 F. Supp. 294 (W.D. Mich. 1997), *aff'd*, 156 F.3d 1228 (6th Cir. 1998), unpublished opinion reported at 1998 U.S. App. LEXIS 17498, an Indian-owned corporation (Baraga), incorporated under the laws of the State of Michigan doing business on an Indian reservation, contested the imposition of the Michigan single business tax. Baraga challenged the tax, arguing that because Michigan may not tax income generated by Indian-owned property and because 100 percent of the shares of Baraga were owned by James Mayo, an enrolled member of the Keweenaw Bay Indian Community, the state could not by extension tax the corporation. The United States District Court, Western Division, granted summary judgment in favor of the Commissioner, and the Sixth Circuit Court of Appeals affirmed. The Court of Appeals, citing *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), correctly relied on a three-part test for determining whether income is exempt from taxation. "[I]ncome is exempt from taxation when it is (1) earned on an Indian reservation, (2) by an enrolled member of an Indian tribe, (3) who lives on the reservation of the tribe in which the member is enrolled." *Baraga*, 1998 U.S. App. LEXIS 17498, at **5.

Regarding whether the enrollment status of the shareholder can be attributed to the corporation, the Sixth

Circuit relied on *Moline, supra*. In *Moline*, this Court held that "The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity . . . the corporation remains a separate taxable entity." *Moline*, at 438, 439 (citations omitted).

Recognizing the inherent differences of a sole proprietorship and corporation, the Court of Appeals found that

> Income of a sole proprietorship is treated as the income of the sole proprietor. *See United States v. Doe*, 465 U.S. 605, 608, 104 S. Ct. 1237, 79 L.Ed.2d 552 (1984). . . . Therefore, if the sole proprietor is an enrolled member of a tribe, so is the sole proprietorship. This is simply not the case with a corporation and is why a corporation that is not itself enrolled cannot attach itself to the shareholder's enrollment status to claim immunity from the tax. It is precisely this lack of oneness that makes adopting the form of a corporation an attractive choice. Shareholders, by maintaining a separate and distinct identity from the corporation are shielded from personal liability for the corporation debts.

Baraga, 1998 U.S. App. LEXIS 17498, at **6-7.

Similarly, in *Airvator v. Turtle Mountain Manufacturing Co.*, 329 N.W.2d 596 (1983), the Supreme Court of North Dakota held that a tribally-controlled business corporation incorporated under North Dakota state law was a non-Indian for a state court jurisdictional analysis. There, the manufacturing company's majority stockholder

was the Turtle Mountain Band of Chippewa Indian Tribe itself, and a major part of the contract in issue was performed on its reservation. Nevertheless, because the business decision had been made to incorporate under state law, *Moline* controlled, and the court treated it as a non-Indian.

The Montana Supreme Court, however, came to an entirely different conclusion than the Court of Appeals and the North Dakota Supreme Court when presented with indistinguishable facts. The Montana Supreme Court failed to discuss or recognize the distinctions between a corporation and a sole-proprietorship. The Montana Supreme Court cited its earlier holding in *LaRoque* for the proposition that "tribal membership is not essential to a determination of whether income earned on the Reservation is taxable." (App. 9, ¶ 18.) The Court concluded that a corporation need not have Indian status in order to be considered exempt from the corporation license tax. Rather, the Court held that, as set forth in its *LaRoque* analysis, greater weight is to be given "to the situs of the taxable income than the status of the income earner." (App. 9, ¶ 19.)

The key issue before the Court of Appeals in *Baraga* and the North Dakota court in *Airvator*, *supra*, and presented for review in this petition for certiorari, is whether a state-chartered corporation can be considered an enrolled member of an Indian tribe based on the enrollment status of its shareholder and the situs of its operations.[3] The Court of Appeals correctly ruled that the

[3] Respondent was not recognized by the Tribes until 1996, fully two years after the tax year in issue. For the period in issue, Flat Center was not recognized as "chartered" by the Tribes.

"general rule" is that "a corporation is an entity distinct from its shareholders," and that "[t]his is particularly true when a corporation is examined for tax purposes." *Baraga*, 1998 U.S. App. LEXIS 17498, at **5.

Because a corporation is a distinct and separate taxable entity, it follows, therefore, that the privileges and tax immunities of Indian shareholders do not flow through to a privately-held business corporation. Felix Cohen, author of the authoritative *Handbook on Federal Indian Law* long ago also concluded that the privileges and immunities of an Indian do not flow through to a privately-held business corporation incorporated under state law. "State chartered corporations, being fictional persons created by the states, should be treated as non-Indians even if owned by Indians." F. Cohen, *Handbook on Federal Indian Law* (1982 ed.) at 355-56. The courts that have addressed this question specifically have, with the exception of Montana, agreed.

II. THE MONTANA SUPREME COURT'S DECISION HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A. Federal Law Does Not Preempt Montana's Power to Tax Indians Not Members of the Tribe on Whose Reservations They Reside.

The Montana court simply ignored this Court's authority that federal law does not preempt state taxation of non-member Indians. "Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose

its taxes on Indians not members of the Tribe. . . . Similarly, the mere fact that nonmembers resident on the reservation come within the definition of 'Indian' for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U.S.C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-61 (1980). *See also, Assiniboine & Sioux Tribes of the Fort Peck Reservation v. Montana*, 568 F. Supp. 269, 273 (1983). The Montana court applied exactly the wrong standard in determining that a non-member was entitled to tax immunity because the shareholders are entitled to receive various Indian program social services delivered on the reservation. (App. 11, ¶ 21.) The court's application of the **presumption** that the State may not tax activities within the boundaries of an Indian reservation (App. 6, ¶ 12) conflicts with this Court's clear line of authority with respect to non-Indians. The State's power to tax is presumed unless prohibited by Congress or preempted by federal law. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 459 (1995); *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 173 (1989) ("more recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress.").

The Montana court's application of the wrong legal standard flows directly from its mistaken conclusion that Respondent should be treated as if it were an enrolled tribal member for purposes of applying this Court's decision in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). Later decisions of this Court have made clear that this rule does not extend a tax exemption to Indians who do not reside on the reservations in which they are enrolled, *Washington v. Confederated Tribes of the*

Colville Reservation at 160-61, or to corporations organized under the law of a state doing business within the boundaries of a reservation, *Cotton Petroleum*, 490 U.S. 163 (1989). The Montana court's conclusion that Denise Murray, an enrolled member of the Turtle Mountain Chippewa Tribe of North Dakota, and the corporation itself are to be treated as enrolled members of the Fort Peck Tribes for purposes of analyzing the corporation's tax status, directly conflicts also with *Arizona Dep't of Revenue v. Blaze Construction Co.*, 526 U.S. 32 (1999) (holding a Blackfeet corporation is a non-member for taxation analysis of activity on the Navajo Reservation).

The member/non-member error is compounded by the Montana court's failure to follow this Court's explicit directions from *Chickasaw Nation* to determine the legal incidence of the tax, and base the preemption analysis not on an evaluation of the economic burden of a tax, but on its legal incidence. In the case of Montana's tax, Respondent does not dispute that the legal incidence of the tax falls on the corporation, not on the Indian shareholders. Nevertheless, the Montana court disregarded the legal incidence and based its conclusion largely on the fact that the beneficiaries of the corporate income were Indians, albeit one is not a member of the Fort Peck Tribes. The corporation is a creature of state law and any tax exemptions available to its shareholders individually do not inure to the benefit of the corporation. *Moline Properties, Inc. v. Commissioner*, *supra*. Thus, under this Court's decision in *Chickasaw Nation*, "no categorical bar prevents enforcement of the tax." 515 U.S. at 459.

Once the legal incidence is determined, this Court's jurisprudence requires a particularized inquiry to determine whether the federal and tribal interests so outweigh

the state interests that federal preemption of the tax may be implied. This has been so for twenty years. *White Mountain Apache Tribe v. Bracker*, *supra*. For example, the Ninth Circuit conducted a particularized inquiry and found no federal preemption of state taxes on income arising from activities on trust lands, in part because the legal incidence of the taxes was not on the tribe, but on non-Indian consumers or lessees of the Tribe. *Yavapai-Prescott Indian Tribe v. Scott, et al.*, 117 F.3d 1107 (1997), *cert. denied*, 522 U.S. 1076 (1998) (no preemption of state tax on room receipts and food and beverage sales arising in tribally-owned hotel on trust land under federally-approved leases); *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (1996) (no preemption of state tax on sales of tickets to sporting and entertainment events at tribally-owned business on reservation); *Loveness v. State ex rel. State of Arizona*, 192 Ariz. 224, 923 P.2d 303 (1998) (no preemption of state tax on income generated on reservation from logging business on reservation).

B. Federal Law Does Not Preempt All State Activity Within a Reservation Absent a Particularized Inquiry or Specific Congressional Action Preempting State Authority.

The Montana court's presumption that the imposition of Montana's tax against Respondent interferes with tribal sovereignty conflicts with numerous recent decisions which require a particularized inquiry into the tribal, state, and federal interests involved to determine whether the state tax is preempted by federal law. *See Cotton Petroleum*, *supra*; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *Yavapai-Prescott*, *supra*; *Gila River*, *supra*. Respondent never specifically argued that the tax would interfere with tribal self-government, nor did it attempt to present any facts from which such a conclusion would be reached. The Montana court's presumption ignores the important role that states play in providing essential governmental services to reservation citizens, who are, after all, citizens of the state and entitled to such services. The Montana court engaged in no balancing of interest tests, examined no delivery of services calculus, nor did it have facts before it evidencing any strong nexus between tribal health safety and welfare, tribal corporate codes or tax codes, federal economic development or farming regulations and this farming business. As *Cotton Petroleum* and other cases cited above demonstrate, absent an affirmative answer to the *White Mountain* balancing inquiry, federal law does not impair the State's ability to impose a tax.

III. THE FORT PECK RESERVATION IS "IN MONTANA" SO THAT BUSINESSES THERE CONDUCT BUSINESS "IN MONTANA."

The Petitioner concedes that tribal members and the Tribes may not be taxed by the State absent express congressional authorization. The State did not tax Murray's individual income. (App. 30, ¶ 8.) The court's conclusion that the Fort Peck Reservation is not located "within the state" for purposes of application of the tax, however, is contrary to this Court's many holdings that for purposes of state governmental activity, Indian reservations are generally part of the states within whose borders they are found. *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353 (2001); *Draper v. United States*, 164 U.S. 240 (1896) (Crow Indian reservation located within the State of Montana for

purposes of criminal jurisdiction over crimes between non-Indians); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930). Under this Court's decisions, the situs of Respondent's farming activities on leased trust lands does not confer tax immunity. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), this Court upheld the application of New Mexico's oil and gas production tax against a non-Indian corporation producing oil and gas from tribal trust lands leased from the Jicarilla Apache Tribe on its reservation in New Mexico. More recently, in *Nevada v. Hicks*, this Court reaffirmed that reservations lie within the states whose territories surround them. *Hicks* at 361-62.

The Court's conclusion seems to stem from its interpretation of *Williams v. Lee*, *supra*. (App. 6, ¶ 13.) This conclusion, however, ignores the last two decades of this Court's rulings regarding the extent of state jurisdiction on Indian lands. The states retain significant sovereignty and have important state interests in activities on reservations when those activities are undertaken by state citizens – here, a state corporation, within reservations of a state. As this Court recently before clarified:

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. **State sovereignty does not end at a reservation's border.** Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 6 Peters 515, 561 (1832);" *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141, 65 L. Ed. 2d 665, 100 S. Ct. 2578 (1980) n.4. "Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State." U.S. Dep't of Interior, Federal Indian Law 510, and n.1 (1958), *citing Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 72, 7 L. Ed. 2d 573, 82 S. Ct. 562 (1962).

Hicks at 361-62 (emphasis added). Without any other facts in the record, it is erroneous as a matter of federal law to presume an interference with tribal sovereignty from assessment of a tax on a private company that does business on a reservation. *Cotton Petroleum*, *supra*, or to conclude that the Fort Peck Reservation does not lie within Montana.

CONCLUSION

No principle of federalism is more deeply engrained in our law than the rule that state courts are obligated to follow and faithfully apply the decisions of this Court as to matters of federal law. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) ("State courts, as much as federal courts, have a solemn obligation to follow federal law.") Because the Montana Supreme Court failed to do so below, this Court should grant a writ of certiorari and reverse the decision of the Montana court.

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September 2002

APPENDIX

No. 00-358

IN THE SUPREME COURT OF THE
STATE OF MONTANA

2002 MT 140

FLAT CENTER FARMS, INC.,

Petitioner and Respondent,

v.

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Respondent and Appellant.

(Filed Jun. 21, 2002)

APPEAL FROM: District Court of the Fifteenth Judicial District, In and for the County of Roosevelt, The Honorable David Cybulski, Judge presiding.

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