

1 **STATE OF NEW MEXICO**  
2 **ADMINISTRATIVE HEARINGS OFFICE**  
3 **TAX ADMINISTRATION ACT**

4 **IN THE MATTER OF THE PROTEST OF**  
5 **JENNIFER A. SKEET**  
6 **TO ASSESSMENT ISSUED UNDER**  
7 **LETTER ID NO. L1393543344**

8 **v.** **Case Number 19.04-071A,**  
9 **AHO D&O # 19-28**

10 **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

11 **DECISION AND ORDER**

12 On September 24, 2019, Hearing Officer Ignacio V. Gallegos, Esq., conducted a merits  
13 administrative hearing in the matter of the tax protest of Jennifer A. Skeet (“Taxpayer”) pursuant  
14 to the Tax Administration Act and the Administrative Hearings Office Act. At the hearing,  
15 Attorney R. Tracy Sprouls (Rodey, Dickason, Sloan, Akin & Robb, P.A.) appeared representing  
16 Taxpayer. Taxpayer Jennifer A. Skeet appeared as a witness. Staff Attorney Peter Breen  
17 appeared, representing the opposing party in the protest, the Taxation and Revenue Department  
18 (“Department”). Department protest auditor Alma Lucero appeared as a witness for the  
19 Department. Taxpayer presented an affidavit, which was accepted in lieu of live testimony,  
20 which the Department waived the opportunity to cross-examine the affiant/witness. Taxpayer’s  
21 and Department’s exhibits were admitted into the record without objection from either party and  
22 are more fully described in the Exhibit log.

23 In quick summary, this protest involves Taxpayer’s 2012 personal income tax and her  
24 claimed exemption from tax. Taxpayer is an enrolled member of the Navajo Nation, was employed  
25 by the Navajo Nation, worked within the Navajo Nation and lived within the Navajo Nation during  
26 work days, despite the fact that she maintained a separate residence in Albuquerque, New Mexico.  
27 The Department assessed tax, penalty, and interest for unpaid tax, which Taxpayer protested,

1 arguing that her wages were exempt from the imposition of personal income tax. Ultimately, after  
2 making findings of fact and discussing the issue in more detail throughout this decision, the hearing  
3 officer finds that the Taxpayer overcame the presumption of correctness, and Taxpayer's protest  
4 must be granted. IT IS DECIDED AND ORDERED AS FOLLOWS:

### 5 **FINDINGS OF FACT**

6 1. On December 18, 2018, under letter id. no. L1393543344, the Department issued  
7 a Notice of Assessment of Taxes and Demand for Payment, indicating that Taxpayer owed tax in  
8 the amount of \$3,646.00, penalty in the amount of \$729.20, and interest in the amount of  
9 \$742.13, for a total tax assessment of \$5,117.33 for personal income taxes for the year ending  
10 December 31, 2012. [Administrative File].

11 2. The Taxpayer protested the assessment of taxes, penalty and interest in a letter  
12 dated January 15, 2019, and stamped as received by the Department on January 22, 2019. The  
13 protest letter included Taxpayer's Certificate of Indian Blood, as well as a copy of her W-2 wage  
14 and tax statement from 2012. [Administrative File].

15 3. The Department acknowledged the Taxpayer's protest, under letter id. no.  
16 L0320731312. [Administrative File].

17 4. The Department requested a hearing on the matter by filing a Hearing Request on  
18 April 12, 2019. [Administrative File].

19 5. The Administrative Hearings Office issued a Notice of Telephonic Scheduling  
20 Hearing on April 15, 2019, setting the matter for a telephonic scheduling conference on May 3,  
21 2019. [Administrative File].

22 6. Administrative Hearing Officer DeeDee Hoxie conducted the telephonic  
23 scheduling conference on May 3, 2019 with the parties present. Neither the Department nor the

1 Taxpayer objected that conducting the scheduling hearing satisfied the 90-day hearing  
2 requirements of Section 7-1B-8 (A) (2015). The Administrative Hearings Officer preserved a  
3 recording of the conference. [Administrative File].

4 7. The Administrative Hearings Office issued a Scheduling Order and Notice of  
5 Administrative Hearing on May 7, 2019, setting discovery deadlines and a date for the merits  
6 hearing on September 24, 2019 in Santa Fe, New Mexico. [Administrative File].

7 8. On May 29, 2019, Attorney R. Tracy Sprouls (Rodey, Dickason, Sloan, Akin &  
8 Robb, PA) filed an Entry of Appearance on behalf of Taxpayer. [Administrative File].

9 9. A Certificate of Service was filed by Attorney R. Tracy Sprouls on June 17, 2019.  
10 [Administrative File].

11 10. On September 24, 2019, the undersigned Administrative Hearing Officer, Ignacio  
12 V. Gallegos, Esq. conducted a merits hearing in Santa Fe, New Mexico. The Administrative  
13 Hearings Officer preserved a recording of the hearing. [Administrative File].

14 11. Taxpayer is an enrolled member of the Navajo Nation. Her local chapter is the  
15 Baahaali Chapter, which is located south of Gallup, New Mexico. [Direct examination of  
16 Jennifer A. Skeet, CD 18:20-18:30; Cross examination of Jennifer A. Skeet, CD 47:20-47:45;  
17 Administrative File (protest letter); Taxpayer's Exhibit 2].

18 12. Taxpayer is a registered voter for the Navajo Nation's Tribal elections. [Direct  
19 examination of Jennifer A. Skeet, CD 18:30-18:45; Taxpayer's Exhibit 2].

20 13. Taxpayer was employed, before, during and after 2012, on the Navajo  
21 reservation, by the Navajo Nation's Office of Legislative Council, the legislative arm of the  
22 Navajo Nation tribal government, whose office is in Window Rock, Arizona. This employment  
23 was her sole source of income during 2012. [Direct examination of Jennifer A. Skeet, CD 11:00-

1 13:35; Cross examination of Jennifer A. Skeet, CD 21:25-22:10; Taxpayer's Exhibit 3;  
2 Administrative File (protest letter, 2012 Form W-2); Department's Exhibit A].

3 14. Through sworn affidavit, Lorene B. Ferguson, retired Justice of the Supreme  
4 Court of the Navajo Nation, affirmed that she rented a residential trailer to Ms. Skeet during the  
5 entire year of 2012. The affidavit affirmed that the residential trailer was situated in Ft.  
6 Defiance, Arizona, within the boundaries of the Navajo Nation, on lands held in trust by the  
7 United States for the benefit of the Navajo Nation, subject to restriction on alienation. [AHO  
8 examination of Jennifer A. Skeet, CD 44:30-46:30; Taxpayer Exhibit 1].

9 15. Taxpayer affirmed that in 2012 during the work week she and her future husband,  
10 Thomas Teegarden, lived at the residential trailer located in Ft. Defiance, Arizona, within  
11 Apache County in order to be close to her work in Window Rock, Arizona. Mr. Teegarden was  
12 working in Gallup, New Mexico during that year. The land upon which the trailer is situated is  
13 within the Navajo Nation, on land held in trust by the United States government. [Direct  
14 examination of Jennifer A. Skeet, CD 11:00-13:50; AHO examination of Jennifer A. Skeet, CD  
15 44:30-46:10].

16 16. In the year 2000, Ms. Skeet and Mr. Teegarden purchased a home in  
17 Albuquerque, New Mexico, but because both of their work positions took them away from the  
18 community home, in 2012, they lived there only part time. On ordinary weeks in 2012,  
19 Taxpayer would leave Albuquerque early Monday morning to get to work, stay in Ft. Defiance  
20 during the work week, and return to Albuquerque Friday evening, unless she had family matters  
21 to attend to over the weekend at her family property outside of Gallup, New Mexico. She  
22 estimated the amount of time away from Albuquerque and on lands within the Navajo Nation

1 was about seventy percent of the year. [Direct examination of Jennifer A. Skeet, CD 15:00-  
2 16:30; 18:50-21:15].

3 17. Taxpayer listed her address on official documents as the Albuquerque address out  
4 of convenience. Of all the locations she could receive her mail, the mail delivery service was  
5 most reliable at the Albuquerque address. She has tried using post office boxes, including the  
6 box her father used in Gallup, New Mexico, one in Fort Defiance, Arizona, and the one assigned  
7 to her office in Window Rock, Arizona. [Direct examination of Jennifer A. Skeet, CD 17:00-  
8 18:15; Cross examination of Jennifer A. Skeet, CD 22:00-25:00; AHO Examination of Jennifer  
9 A. Skeet, CD 46:15-46:30; Department Exhibits A, A-1, A-2, B, C, D, E].

10 18. Taxpayer first moved to Arizona in February of 1998. [Cross examination of  
11 Jennifer A. Skeet, CD 25:00-25:20].

12 19. Taxpayer filed her federal income tax returns in 2011, 2012, and 2013 using the  
13 Albuquerque address. [Department Exhibit A, A-1, A-2].

14 20. Taxpayer was registered in 2000, was still registered in 2012, and remains  
15 registered to vote in federal, state and local elections using the Albuquerque address. Taxpayer  
16 does not vote in elections in Apache County or in the State of Arizona. [Cross examination of  
17 Jennifer A. Skeet, CD 26:40-27:10, 32:25-35:15; Department Exhibit B, C].

18 21. Taxpayer and her husband pay property taxes for the home in Albuquerque. They  
19 claim the head-of-household exemption. [Cross examination of Jennifer A. Skeet, CD 36:30-  
20 38:15; Department Exhibit D].

21 22. Taxpayer used the Albuquerque address for her driver's license registration since  
22 at least 2009. Her driver's license has always been through the State of New Mexico. Her  
23 vehicle registrations also have always been through the State of New Mexico. This was out of

1 habit, since she grew up on the New Mexico side of the state border, within the Navajo Nation.  
2 [Cross examination of Jennifer A. Skeet, CD 38:30-43:05; Department Exhibit E, F].

3 23. Taxpayer's childhood home, a family ranch, is in the area of Bread Springs, New  
4 Mexico, on the lands of the Navajo Nation, south of Gallup, New Mexico. The family ranch is  
5 about 26 miles from Window Rock, Arizona. [Direct examination of Jennifer A. Skeet, CD  
6 18:10-18:30; Cross examination of Jennifer A. Skeet, CD 23:30-24:10].

7 24. Fort Defiance, Window Rock and Saint Michaels are rural communities in close  
8 proximity to one another. [Cross examination of Jennifer A. Skeet, CD 22:35-23:00; 25:15-  
9 25:40].

10 25. From Fort Defiance to the home in Albuquerque, the drive takes Ms. Skeet about  
11 two hours and 45 minutes. [Cross examination of Jennifer A. Skeet, CD 25:15-25:40].

12 26. Taxpayer acknowledged that over the course of her employment with the  
13 Legislative Council, she has worked from the home in Albuquerque on rare occasions. The  
14 Department did not ask her to provide definite dates during 2012 that she may have worked from  
15 home, despite eliciting testimony that she brought her 2012 day-planner to the hearing. [Cross  
16 examination of Jennifer A. Skeet, CD 28:00-30:10].

17 27. When she was in Fort Defiance, she shopped locally, including in Window Rock  
18 and Gallup. When she was in Albuquerque, she shopped in the Albuquerque area. [Direct  
19 examination of Jennifer A. Skeet, CD 16:05-16:50].

20 28. Taxpayer was, in 2012, and remains a member of the State of New Mexico Bar  
21 Association and the Navajo Nation Bar Association. [Cross examination of Jennifer A. Skeet,  
22 CD 27:10-27-30, 32:25-33:00].



1 burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M.*  
2 *Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.

3 The burden is also on taxpayers to prove that they are entitled to an exemption or  
4 deduction, if one should potentially apply. *See Pub. Serv. Co. v. N.M. Taxation & Revenue Dep't*,  
5 2007-NMCA-050, ¶141 N.M. 520, 157 P.3d 85; *See also Till v. Jones*, 1972-NMCA-046, 83  
6 N.M. 743, 497 P.2d 745. “Where an exemption or deduction from tax is claimed, the statute must  
7 be construed strictly in favor of the taxing authority, the right to the exemption or deduction must  
8 be clearly and unambiguously expressed in the statute, and the right must be clearly established  
9 by the taxpayer.” *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068,  
10 ¶8, 107 N.M. 540, 760 P.2d 1306. *See also Wing Pawn Shop v. Taxation & Revenue Dep't*, 1991-  
11 NMCA-024, ¶16, 111 N.M. 735, 809 P.2d 649. *See also Chavez v. Comm'r of Revenue*, 1970-  
12 NMCA-116, ¶7, 82 N.M. 97, 476 P.2d 67.

### 13 **Personal Income Tax**

14 The New Mexico Income Tax Act, NMSA 1978, Sections 7-2-1 through 7-2-37, reflects the  
15 Legislature’s intent to tax the income of New Mexico residents, and certain nonresidents. Section  
16 7-2-3 (1981) states: “A tax is imposed at the rates specified in the Income Tax Act upon the net  
17 income of every resident individual and upon the net income of every nonresident individual  
18 employed or engaged in the transaction of business in, into or from this state, or deriving any  
19 income from any property or employment within this state.”

20 For income tax purposes, residency matters. The Income Tax Act definitions in effect in  
21 2012 define, in pertinent part, a “resident” as “an individual who is domiciled in this state during  
22 any part of the taxable year or an individual who is physically present in this state for one hundred  
23 eighty-five days or more during the taxable year.” Section 7-2-2 (S) (2010). And a “nonresident” is



1 “every individual not a resident of this state.” Section 7-2-2 (Q) (2010). The evidence showed that  
2 Ms. Skeet maintained residences both in New Mexico, and in the Navajo Nation, on the Arizona  
3 side of the state border.

4 The claim for exemption in this case stems from Section 7-2-5.5 (1995). The law reads:  
5 “Income earned by a member of a New Mexico federally recognized Indian nation, tribe, band or  
6 pueblo, his spouse or dependent, who is a member of a New Mexico federally recognized Indian  
7 nation, tribe, band or pueblo, is exempt from state income tax if the income is earned from work  
8 performed within and the member, spouse or dependent lives within the boundaries of the Indian  
9 member’s or the spouse’s reservation or pueblo grant or within the boundaries of lands held in trust  
10 subject to restriction against alienation imposed by the United States.” The statutory exemption  
11 itself is a modified codification of the Supreme Court’s holding of *McClanahan v. Arizona State*  
12 *Tax Comm’n*, 411 U.S. 164, 93 S. Ct. 1257 (1973), which overturned a state law imposing a tax on  
13 the personal income of reservation Indians which income was wholly derived from reservation  
14 sources.

15 There is no dispute that three of the four necessary elements of the statute are satisfied by  
16 the evidence. There is no dispute that (1) Ms. Skeet is an enrolled member of the Navajo Nation.  
17 There is no dispute that (2) the Navajo Nation is a New Mexico federally recognized Indian nation,  
18 tribe, band or pueblo. There is no dispute that (3) the income at issue here was wholly derived from  
19 Ms. Skeet’s employment as legal counsel for the legislative arm of the Navajo Nation’s  
20 government, while on the reservation of the Navajo Nation, a reservation source. The sole dispute  
21 is whether (4) Ms. Skeet qualifies as someone who “lives within the boundaries of the Indian  
22 member’s or the spouse’s reservation or pueblo grant or within the boundaries of lands held in trust  
23 subject to restriction against alienation imposed by the United States.” Narrowed further, the

1 Department does not question the status of the land<sup>1</sup>, only whether Ms. Skeet was domiciled on the  
2 Navajo Nation or in Albuquerque, New Mexico. The Department contends that Taxpayer in 2012  
3 did not “live within the boundaries” of the reservation, because she owns a familial residence in  
4 Albuquerque, which the Department contends is her domicile. The taxpayer contends that the  
5 majority of her time in 2012 was spent on the Navajo Nation, and her residence for work was a  
6 rented trailer on lands held in trust, subject to restrictions on alienation, within the Navajo Nation,  
7 and domicile is not the relevant inquiry.

## 8 **Domicile**

9 The Department argued that whether the exemption applies hinges on a determination of  
10 domicile and residency. To examine this argument, one must determine what the legislature  
11 intended in writing the statute.

12 When construing statutes, our guiding principle is to determine and give effect to  
13 legislative intent. In ascertaining the Legislature's intent, we are aided by classic  
14 canons of statutory construction. We look first to the plain language of the statute,  
15 giving the words their ordinary meaning, unless the Legislature indicates a different  
16 one was intended. In addition, we strive to read related statutes in harmony so as to  
17 give effect to all provisions... the provisions of a statute must be read together with  
18 other statutes in *pari materia* under the presumption that the legislature acted with  
19 full knowledge of relevant statutory and common law. Thus, two statutes covering  
20 the same subject matter should be harmonized and construed together *when possible*,  
21 in a way that facilitates their operation and the achievement of their goals.

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<sup>1</sup> The language of Section 7-2-5.5 concerning the land status, i.e., a “reservation or pueblo grant or within the boundaries of lands held in trust subject to restriction against alienation imposed by the United States,” generally tracks the federal jurisprudence and statutory law defining “Indian country.” “Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.” *Oklahoma Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123, 113 S.Ct. 1985 (1993). *See also*, 25 U.S.C. 1151 (“ “Indian country”, as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”).

1 *N.M. Indus. Energy Consumers v. Pub. Regulation Comm’n*, 2007-NMCA-053, ¶ 20, 142 N.M.  
2 533, 168 P.3d 105 (quotation marks, citations and ellipsis omitted) (emphasis in original).

3 Likewise, extra words are not to be read into the statute, if it makes sense as written. *See Johnson v.*  
4 *N.M. Oil Conservation Comm’n*, 1999-NMSC-021, ¶ 27, 127 N.M. 120, 978 P.2d 327.

5 “Domicile” is defined in a subsection of the regulation elucidating “residency.” *See*  
6 Regulation 3.3.1.9 (C) NMAC (12/15/10). “A domicile is the place where an individual has a true,  
7 fixed home, is a permanent establishment to which the individual intends to return after an absence,  
8 and is where the individual has voluntarily fixed habitation of self and family with the intention of  
9 making a permanent home. Every individual has a domicile somewhere, and each individual has  
10 only one domicile at a time.” *Id.* Under the thirteen non-exclusive factors for domicile, the  
11 Department established many factors in favor of finding Ms. Skeet’s domicile during 2012 was in  
12 Albuquerque, New Mexico, where she maintained a fixed residence since 2000, which she owned  
13 by herself and her husband, where she would return to after the work week, the address of which  
14 she used for federal income tax returns, driver’s licensing, vehicle registration, voter registration,  
15 and other important documents. Ms. Skeet also established that she has lived and worked on the  
16 Navajo Nation since 1998, maintaining a rented home there, maintaining community and familial  
17 connections there, with a family ranch within the Navajo Nation, near the chapter house where she  
18 maintains her member enrollment, she works for and within the Navajo Nation, and she is  
19 professionally licensed in New Mexico and with the Navajo Nation bar associations.

20 Nevertheless, whether Ms. Skeet is a statutory “resident” of New Mexico is not the issue to  
21 be decided here. The claimed exemption does not use the words “resident of” or “domiciled  
22 within” Indian country as a precursor to granting the exemption. Turning to the language of the  
23 exemption statute, the element at issue here is whether “the member ... lives within the boundaries”

1 of Indian country. *See* Section 7-2-5.5. The applicable phrase is “lives within the boundaries.” The  
2 phrase is not “is a resident of” or “is domiciled within” or “lives exclusively within.” The  
3 Legislature could have chosen such other language to properly reflect its intent, if its true intent was  
4 to conflate “lives within” with “domicile.” As stated in previous decisions of this office, “[n]either  
5 the statute nor the regulation interpreting the statute provide a definition, standard, or test to  
6 determine what is meant to “live within the boundaries” of tribal land.” *See The protest of Aurelia*  
7 *Shorty*, Decision and Order #11-17, issued August 17, 2011 (N.M. Taxation and Revenue Dep’t,  
8 Hearings Bureau), page 8 (non-precedential); *See also, The protest of John and Bonnie Yearley*,  
9 Decision and Order #11-29, issued December 2, 2011 (N.M. Taxation and Revenue Dep’t, Hearings  
10 Bureau), page 10-11 (non-precedential); *Accord, The protest of Edward J. Clah and Melvina*  
11 *Murphy*, Decision and Order #12-19, issued September 21, 2012, (N.M. Taxation and Revenue  
12 Dep’t, Hearings Bureau) (non-precedential). The “lives within” language originates from federal  
13 jurisprudence, which the legislators who bore the bill into law, are presumed to be aware of.  
14 *McClanahan*, at 165 (“Appellant is an enrolled member of the Navajo tribe who *lives on* that  
15 portion of the Navajo Reservation located within the State of Arizona”) (emphasis added).  
16 *Oklahoma Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123, 113 S.Ct. 1985 (1993) (“a tribal  
17 member need not *live on* a formal reservation to be outside the State’s taxing jurisdiction; it is  
18 enough that the member *live in* ‘Indian country.’”) (emphasis added).

19         The Department urged the Hearing Officer to use the same standards the Navajo Supreme  
20 Court used when determining whether an applicant to be elected as President of the Navajo Nation  
21 satisfied the residency requirements of that position. *See In re Lee*, 2006 Navajo Sup. LEXIS 8, 6  
22 American Tribal Law 788. In that instance, the applicable language of the Navajo Nation Code  
23 required that the presidential candidate both have “permanent residence” and be “continually

1 present” within the Navajo Nation for three years preceding the election. *Id.* at 4-5. While the  
2 Navajo Supreme Court ultimately overturned the permanent residency requirement, allowing the  
3 voters to decide who represented their interests, the New Mexico legislature did not use that same  
4 language, so the same analysis does not assist us in interpreting what the New Mexico legislature  
5 intended. Extra words are not to be read into the statute, if it makes sense as written. *See Johnson*,  
6 at ¶ 27.

7 When interpreting the phrase “lives within the boundaries” of tribal land, this forum has  
8 afforded great weight to “a continuing physical presence” as opposed to the person’s intent to  
9 return, remain and make a permanent home, which is a guiding principal of “domicile.” *See The*  
10 *protest of Aurelia Shorty*, Decision and Order #11-17, issued August 17, 2011; *See also, The protest*  
11 *of John and Bonnie Yearley*, Decision and Order #11-29, issued December 2, 2011; *Accord, The*  
12 *protest of Edward J. Clah and Melvina Murphy*, Decision and Order #12-19, issued September 21,  
13 2012. *See also* Regulation 3.3.1.9 NMAC. I will continue to do so even though stare decisis does  
14 not strictly apply to decisions of this forum. Administrative decisions are not given the weight of  
15 precedence. *See Hess Corp. v. N.M. Taxation and Revenue Dep’t*, 2011-NMCA-043, ¶ 35, 149  
16 N.M. 527 (noting that an unpublished decision is written solely for the benefit of the parties and is  
17 not controlling precedent). *See also* Rule 12-405 NMRA (2012) (stating that unpublished decisions  
18 are not precedent but may still be persuasive). I continue to do so because the weight of the  
19 common law on the subject supports the method of interpretation. *See State v. Hubble*, 2009-  
20 NMSC-014, ¶13, 146 N.M. 70, 206 P.3d 579 (A statutory construction analysis begins by  
21 examining the words chosen by the legislature and the plain meaning of those words). *See also*  
22 *Johnson v. N.M. Oil Conservation Comm’n*, 1999-NMSC-021, ¶ 27, 127 N.M. 120, 978 P.2d 327

1 (Extra words should not be read into a statute if the statute is plain on its face, especially if it makes  
2 sense as written).

3 Under this standard, Ms. Skeet, who maintains residences on both sides of the state border,  
4 one within the Navajo Nation in Arizona, and one outside the Navajo Nation’s boundaries in New  
5 Mexico, qualifies as living both within the boundaries and outside the boundaries. Ms. Skeet lives  
6 on trust lands within the Navajo Nation while working, and she lives outside the Navajo Nation  
7 when not working. She spends seventy percent of her time on the Navajo Nation, either in the Fort  
8 Defiance and Window Rock area, or at the family ranch in Bread Springs. For the other thirty  
9 percent of her time, she spends time with her husband, primarily in Albuquerque. Where a taxpayer  
10 goes on her days off, during paid vacation time or paid sick time is not relevant to the Department in  
11 determining the applicability of the exemption. The exemption of Section 7-2-5.5 applies to Ms.  
12 Skeet’s income, because during 2012 she lived within the boundaries of the Navajo Nation when  
13 she earned her income. *See The protest of James and Nora Tutt*, Decision and Order #13-36, issued  
14 November 27, 2013, (N.M. Taxation and Revenue Dep’t, Hearings Bureau) (non-precedential)  
15 (protest granted when taxpayer, a tribal member, showed that his employer, a tribal entity, provided  
16 housing for him on tribal lands, despite the fact he maintained a familial residence off of tribal  
17 lands).

### 18 **Constitutional law**

19 The parties urged the Hearing Officer to consider Supreme Court caselaw, and in doing so  
20 suggested that even without the statutory exemption, the income was not taxable by the state. As  
21 stated above, the exemption is a modified codification of rules established under constitutional law.  
22 Under the United States Constitution, Congress shall have the power “[t]o regulate Commerce with  
23 foreign Nations, and among the several States, and with the Indian Tribes.” USCS Const. Art. I, § 8,

1 Cl 3. It is longstanding jurisprudence that the Constitution permits Congress alone to regulate trade  
2 and intercourse with Indian nations, and to treat them “as distinct political communities, having  
3 territorial boundaries, within which their authority is exclusive.” *Worcester v. Georgia*, 31 U.S. 515,  
4 557 (1832).

5 Over the years, the Supreme Court has addressed various states’ attempts to tax gross  
6 receipts, property, inheritance, business activity, motor vehicle fuel, tobacco sales, and individual’s  
7 income both within and outside Indian country. In the leading case pertinent to income tax,  
8 *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 93 S. Ct. 1257 (1973), the taxpayer  
9 conceded that she was a resident of the state under the Arizona tax law. *See Id.* at 166, FN 3. The  
10 fact that the taxpayer legally qualified as a resident of Arizona played no role in the Supreme  
11 Court’s analysis of the issue or its ultimate holding. The relevant inquiry was first, whether the  
12 income was wholly derived from “reservation sources”, and second, whether the income was earned  
13 by a “reservation Indian.” *Id.* at 165. Ms. Rosalind McClanahan, the plaintiff-appellant, was an  
14 “enrolled member of the Navajo tribe” and she lived “on that portion of the Navajo Reservation  
15 located within the State of Arizona.” *Id.* Further, the entirety of her income was “derived from  
16 within the Navajo Reservation.” *Id.* at 166. By attempting to tax the income earned, the state of  
17 Arizona “interfered with matters which the relevant treaty and statutes leave to the exclusive  
18 province of the Federal Government and the Indians themselves.” *Id.* at 165. Yet, the Court  
19 explicitly limited its holding, stating: “We are not here dealing with Indians who have left or never  
20 inhabited reservations set aside for their exclusive use or who do not possess the usual  
21 accoutrements of tribal self-government.” *Id.* at 167. The Court indicated that “the [Indian  
22 sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation  
23 and become assimilated into the general community.” *Id.* at 171.

1 In the same decision, the Supreme Court used a methodology for analysis of such issues as  
2 well as reiterated its clear canon of construction, a rule of leniency, to interpret “doubtful” treaty  
3 language to favor the Indian people. *Id.* at 174. The court reiterated the starting point and general  
4 principal of law that, absent an act of Congress, who is empowered by the Constitution to engage in  
5 commerce with Indians, Federal law prohibits states from exercising authority over Indians and  
6 Indian lands, stating: “State laws generally are not applicable to tribal Indians on an Indian  
7 reservation except where Congress has expressly provided that State laws shall apply.” *Id.* at 170-  
8 171. So, to answer the question of taxability, using the methodology used by the Court in  
9 *McClanahan*, and thereafter, we start with the treaty, proceed to subsequent acts of Congress,  
10 including enabling legislation of the State of New Mexico, and court precedent.

### 11 ***Treaties***

12 The *Treaty with the Navaho, 1849*, Sept. 9, 1849, 9 Stat. 974 (“1849 Treaty”), and the  
13 *Treaty with the Navaho, 1868*, June 1, 1868, 15 Stat. 667 (“1868 Treaty”), are the two treaties  
14 providing the entire agreements between Congress and the Navajo Nation. While the 1849 Treaty  
15 refers to the laws of New Mexico, the State of New Mexico had not been established, and would not  
16 be until 1912. Nevertheless, the 1849 Treaty acknowledges that the government of the United States  
17 has “the sole and exclusive right of regulating trade and intercourse with the said Navajoes.” *See*  
18 Art. III. The 1868 Treaty by its terms secured, primarily, a peace between the warring United States  
19 and the Navajo Nation and provided protection against acts of “bad men” from either group who  
20 crossed boundaries and did harm to members of the other group. *See* Art. I. The agreement  
21 conferred the Navajo Nation the right to reserved lands and described the land with particularity.  
22 *See* Art. II.<sup>2</sup> Yet, perhaps as a warning against interference with westward expansion and a method

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<sup>2</sup> After 1868, the treaty-making power of Congress was limited, and adjustments to the reservation land boundaries were made by Executive orders. *See* Peter Iverson, *Diné: A History of the Navajos* 71-74 (2002).



1 of assimilation, Article XIII, informs the parties that “if any Navajo Indian or Indians shall leave the  
2 reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and  
3 annuities conferred by the terms of this treaty.” *Id.* Art. XIII.

4 Federal decisions have addressed the meaning of Article XIII. One court established that a  
5 Navajo victim of assault off the reservation had forfeited her right to government reparations under  
6 the “bad men” provision of Article I of the 1868 Treaty. *Pablo v. United States*, 98 Fed. Cl. 376  
7 (2011). Another court established that a Navajo student, residing in a school dormitory controlled  
8 by Navajo authorities, but off the reservation, forfeited his right under the same “bad men”  
9 provision of Article I of the 1868 Treaty, after an assault by another student. *Herrera v. United*  
10 *States*, 39 Fed. Cl. 419 (1997). In both instances, the Courts found that the language of the forfeiture  
11 provision of Article XIII of the 1868 Treaty was unambiguous, and the territorial scope of the “bad  
12 men” provisions strictly limited the application of the protection granted under the 1868 Treaty.  
13 *Herrera*, at 421. *See also Pablo*, at 382. The protection against state taxation on income, however,  
14 does not stem from the treaty exactly, as taxation is never mentioned within the 1868 Treaty. The  
15 protection stems from inherent Indian sovereignty and from Congress’s inherent power to regulate  
16 commerce with Indians. So, by leaving the lands of the reservation, even with the intent to “settle”  
17 elsewhere, there is no presumptive abandonment or forfeiture of the immunity from state taxation  
18 for activity wholly conducted on the reservation, by a member of the tribe, especially, since the  
19 individual Taxpayer here made a conscious and concerted commitment to return to the reservation,  
20 living there several days of every week to earn the income in question.

### 21 ***Statehood***

22 Next, we turn to era of statehood. New Mexico became a State in 1912. The enabling act,  
23 allowing the Territory of New Mexico to form a state constitution was an act of the United States

1 Congress, on June 20, 1910. *See* Statehood of New Mexico and Arizona, 61 P.L. 219, 36 Stat. 557,  
2 61 Cong. Ch. 310. Within the enabling act, Congress required that “the people inhabiting said  
3 proposed State do agree and declare that they forever disclaim all right and title ...to all lands lying  
4 within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall  
5 have been acquired through or from the United States or any prior sovereignty, and that until the  
6 title of such Indian or Indian tribes shall have been extinguished the same shall be and remain  
7 subject to the disposition and under the absolute jurisdiction and control of the Congress of the  
8 United States.” *See Id.* Sec. 2, at 558. The enabling act reminds the proposed State of New Mexico  
9 that “no taxes shall be imposed by the State upon lands or property therein [within the reservation].”  
10 *Id.* at 559. The New Mexico Constitution then solidified the requirements of the enabling act, by  
11 adopting it in its entirety as an article on January 21, 1911. N.M. Const. Art. XXI. The explicit  
12 prohibition, required of New Mexico by Congress for statehood, forbids state taxation of “lands or  
13 property therein [within the reservation].” *Id.*

#### 14 ***Acts of Congress***

15 Following New Mexico’s statehood in 1912, Native Americans became United States  
16 citizens under the Indian Citizenship Act, 43 Stat. 253 (June 2, 1924), as superseded by Nationality  
17 Act of 1940, 54 Stat. 1137, 8 USCS § 1401(b). Both the Indian Citizenship Act and the Nationality  
18 Act protected tribal members from impairment of their property rights as members of their tribes.  
19 The Indian Reorganization Act did not change any specific tax aspect of the relationship between  
20 New Mexico and the Navajo Nation. *See* 73 P.L.383, 48 Stat. 984 (1934). However, the Indian  
21 Reorganization Act did provide a mechanism for tribes to create their own constitutions, and  
22 provided that tribal governments created thereby would retain their rights to “negotiate with the  
23 Federal, State and local Governments.” 48 Stat. 984, 987. Pursuant to this power to negotiate, the

1 Hearing Officer could not discover any compact negotiated between the Navajo Nation and the  
2 State of New Mexico affecting income taxation. New Mexico is not a state which has assumed civil  
3 or criminal jurisdiction in Indian country pursuant to Public Law 280. P.L. 83-280, 67 Stat. 588  
4 (1953).

5 *Survey of relevant cases*

6 After *McClanahan*, the Supreme Court addressed another state taxation issue in *Oklahoma*  
7 *Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985 (1993). In the runup to the  
8 Supreme Court, as summarized by the Supreme Court, “[t]he District Court ‘did not look to where  
9 the tribal members resided; it rested its holding instead only on where they worked.’” *Id.* at 121.  
10 And the Tenth Circuit Court of Appeals “looked only to the status of the land on which the income  
11 was earned” and ignored the residence of the income earner. *Id.* at 122. The Supreme Court  
12 determined that not considering where a tribal member lives is error, and that “[t]he residence of a  
13 tribal member is a significant component of the *McClanahan* presumption against state tax  
14 jurisdiction. But our cases make clear that a tribal member need not live on a formal reservation to  
15 be outside the State’s taxing jurisdiction; it is enough that the member live in Indian country.” *Id.* at  
16 123 (quotation marks omitted). That determination was made in light of the fact that the Oklahoma  
17 Tax Commission argued that the reservation had been disestablished pursuant to the terms of the  
18 1891 Treaty between the Congress and the Sac and Fox Nation. Nevertheless, the Supreme Court  
19 remanded the case for additional evidence of where the tribal employees lived. *Id.* at 126. It should  
20 be noted that even though the Supreme Court used “residence” and “live in” interchangeably, they  
21 were not interpreting New Mexico’s or any other state’s definition of residence.

22 Here presents the vexing problem, and a convergence of jurisprudence. There is  
23 jurisprudence that covers activity on tribal lands, by tribal members, and there is jurisprudence that

1 covers activity by the tribe and tribal members outside the boundaries of tribal lands. *Mescalero*  
2 *Apache Tribe v. Jones*, 411 U.S.145, 93 S.Ct. 1267 (1973) is a case of the latter sort. The Supreme  
3 Court allowed the State of New Mexico to impose a gross receipts tax on the receipts of a ski resort  
4 owned by the Mescalero Apache Tribe, where the resort was located off the reservation on land  
5 leased from the federal government. The court made it clear that the New Mexico enabling act  
6 reserved the right of the State of New Mexico to tax all Indian land and Indian activities located or  
7 occurring outside of an Indian reservation. *Id.* at 149-150.

8 Hence, the relevant inquiry contains not only where the actor was living at the time, but also  
9 where the income-generating activity took place. “When on-reservation conduct involving only  
10 Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be  
11 minimal and the federal interest in encouraging tribal self-government is at its strongest.” *White*  
12 *Mountain Apache Tribe et al. v. Bracker et al.*, 488 U.S. 136, 144, 100 S. Ct. 2578 (1980). The line  
13 of cases involving tribal activity outside of “Indian country” includes a discussion of the possibility  
14 of what happens when the taxable activity occurs both within Indian country and outside its  
15 boundaries. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134,  
16 163-164 (1980) held that when the state motor vehicle use tax is not tailored to the actual amount of  
17 off-reservation activity, the tax is invalid. The tax in that instance was based on vehicle value,  
18 rather than usage within the state. *Id.* at 142.

19 These cases encourage lower courts and administrative forums such as this to consider both  
20 the location of the tribal member (within the state or in Indian country), and the location of the  
21 activity sought to be taxed (within the state, within Indian country). Under the sought exemption,  
22 Section 7-2-5.5, there is no requirement of exclusivity of “living within the boundaries” of a  
23 reservation, but the Taxpayer in this instance does maintain a residence on the reservation to be

1 close to work. The New Mexico personal income tax does not, in such an instance, tailor its scope  
2 to exclude activities conducted wholly on the reservation. Hence, the State of New Mexico has  
3 overreached in assessing this Taxpayer for all personal income gained wholly on the reservation, by  
4 a reservation Indian, who lives within the reservation boundaries.

5 **Department Regulations and 2012 PIT-1 Instructions:**

6 While the statute does not provide guidance to taxpayers that the Department considered  
7 “lives within” to be conflated with “domicile,” the Department’s regulations and instructions for the  
8 2012 PIT-1<sup>3</sup> and PIT-1 EZ<sup>4</sup> do. The regulation which covers residency and domicile provides the  
9 following example:

10 G is a Native American who lives and works on his tribe’s pueblo in New Mexico.  
11 Federal law prohibits the state from taxing income earned by a Native American  
12 who lives and works on his tribe’s territory. G joins the marines and is stationed  
13 outside New Mexico. Because G’s *domicile* remains unchanged during his military  
14 service, G’s income from military service is treated as income earned on the tribe’s  
15 territory by a tribal member living on the tribe’s territory, and is not taxable by New  
16 Mexico.

17 Regulation 3.3.1.9 (E)(8) NMAC (12/15/10) (emphasis added). In this example, the physical  
18 location of the work does not matter, as long as the domicile (characterized by the intent to return to  
19 the pueblo after leaving the military) remains.

20 The PIT-1 instructions provide this guidance:

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<sup>3</sup> Available online through the New Mexico Taxation and Revenue Department’s website,  
<http://www.tax.newmexico.gov/forms-publications.aspx> at: <https://s3.amazonaws.com/realFile34821a95-73ca-43e7-b06d-fad20f5183fd/85ea18d5-2110-4a0e-971a-3d9e2e5eaae2?response-content-disposition=filename%3D%222012pit-1-ins.pdf%22&response-content-type=application%2Fpdf&AWSAccessKeyId=AKIAJBI25DHBYGD7I7TA&Signature=UYOiqCG00d8WW%2Bh8d%2Fjmnw7eEwU%3D&Expires=1572556562> (last accessed 10/31/2019).

<sup>4</sup> Available online through the New Mexico Taxation and Revenue Department’s website,  
<http://www.tax.newmexico.gov/forms-publications.aspx> at: <https://s3.amazonaws.com/realFile34821a95-73ca-43e7-b06d-fad20f5183fd/809f8e9b-065e-41e0-b6cd-01562e09d067?response-content-disposition=filename%3D%222012pit-ez-ins.pdf%22&response-content-type=application%2Fpdf&AWSAccessKeyId=AKIAJBI25DHBYGD7I7TA&Signature=iIfwYJAjcnbnkftjWhH0m2z7LUU%3D&Expires=1572556661> (last accessed 10/31/2019).

1 **Member of an Indian Nation, Tribe or Pueblo**

2 The income of Indians who worked or lived on lands outside the Indian nation, tribe  
3 or pueblo of which they are members is subject to New Mexico personal income tax.

4 Enrolled members of an Indian nation, tribe or pueblo who lived on the lands of the  
5 Indian nation, tribe or pueblo where they are members and whose entire income was  
6 earned from work on those lands do not need to file a New Mexico income tax  
7 return. The income of a spouse or dependent of an “Enrolled member” is also  
8 exempt, provided the spouse or dependent lives and works within the boundaries of  
9 the member’s nation, tribe or pueblo.

10 Lands include formal and informal reservations, dependent Indian communities, and  
11 Indian allotments, whether restricted or held in trust by the United States.

12 *2012 New Mexico Personal Income Tax (PIT) Form Packet* at 1-2 (General Information:  
13 Who must file). This informational instruction tracks the statute and Constitutional precedent  
14 concerning Indian country. However, the body of the instruction goes on to say:

15 **File Schedule PIT-ADJ** if you received any of the following income not taxable by  
16 New Mexico or if you qualify for one or more of the following deductions or  
17 exemptions: ... you or your spouse, or both, are members of an Indian nation, tribe  
18 or pueblo and your income was wholly earned on the lands of the reservation or  
19 pueblo of which the individual is an enrolled member while *domiciled* on that  
20 reservation, tribe or pueblo. (emphasis added)

21 *Id.* at 6 (Required forms and attachments). This language is repeated in the instructions for Line 15  
22 of the 2012 PIT-1 form, *Id.* at 20, and in the instructions for Line 15 of the 2012 PIT-EZ form, at 3.

23 The use of the word “domiciled” reflects the Department’s intent to conflate “lives within”  
24 and “domicile.” NMSA 1978, Section 9-11-6.2 (G) (2015) indicates: “[a]ny regulation, ruling,  
25 instruction or order issued by the secretary or delegate of the secretary is presumed to be a proper  
26 implementation of the provisions of the laws that are charged to the department, the secretary, any  
27 division of the department or any director of any division of the department.” The Department may  
28 interpret a tax statute without adopting a rule or regulation related to that statute. *See Id.* “The  
29 legislature may not delegate authority to a board or commission to adopt rules or regulations which

1 abridge, enlarge, extend or modify the statute creating the right or imposing the duty.” *Rainbo*  
2 *Banking Co. of El Paso, Tex. v. Comm’r of Revenue*, 1972 NMCA-139, 84 N.M. 303, 502 P.2d 406.  
3 When an agency is charged with the application of a statute, its construction is given some  
4 deference, but its construction will be disregarded if its interpretation of the statute is found to be  
5 unreasonable or unlawful. *See N.M. AG v. N.M. Pub. Regulation Comm’n*, 2013-NMSC-042, ¶ 12.  
6 When statutes and regulations are inconsistent, the statute prevails. *See Picket Ranch, LLC v.*  
7 *Curry*, 2006-NMCA-082, ¶ 10, 140 N.M. 49. A regulation cannot overrule a statute. *See Jones v.*  
8 *Employment Servs. Div.*, 1980-NMSC-120, 95 N.M. 97. Here, because the statutory language  
9 tracks Supreme Court precedent on constitutional law, which is the supreme law of the land, and the  
10 regulation and the instructions expand the meaning of the language used in the statute, the statute  
11 and the Supreme Court precedent prevail.

## 12 CONCLUSIONS OF LAW

13 A. Taxpayer filed a timely, written protest of the Department’s assessment and  
14 jurisdiction lies over the parties and the subject matter of this protest.

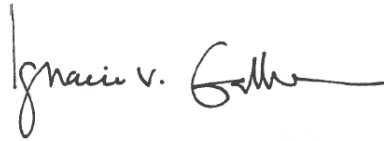
15 B. The hearing was timely set and held within 90-days of protest under NMSA 1978,  
16 Section 7-1B-8 (2015).

17 C. Taxpayer properly claimed that her income from work performed on the Navajo  
18 Nation, by an enrolled member of the Navajo Nation, who lives on lands within the Navajo Nation  
19 was exempt from taxation under NMSA 1978, Section 7-2-5.5 (1995).

20 D. Taxpayer’s income is exempt from state taxation pursuant to federal jurisprudence.  
21 *See McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 93 S. Ct. 1257 (1973). *See also*  
22 *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 163-164  
23 (1980).

1 For the foregoing reasons, the Taxpayer's protest **IS GRANTED. IT IS ORDERED** that  
2 the Department abate any outstanding 2012 income tax, penalty and interest remaining under the  
3 assessment.

4 DATED: November 7, 2019.



5  
6 Ignacio V. Gallegos  
7 Hearing Officer  
8 Administrative Hearings Office  
9 P.O. Box 6400  
10 Santa Fe, NM 87502

11 **NOTICE OF RIGHT TO APPEAL**

12 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this  
13 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the  
14 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this  
15 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates  
16 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.  
17 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative  
18 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative  
19 Hearings Office may begin preparing the record proper. The parties will each be provided with a  
20 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,  
21 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing  
22 statement from the appealing party. *See* Rule 12-209 NMRA.



1 **CERTIFICATE OF SERVICE**

2 On November 7, 2019, a copy of the foregoing Decision and Order was submitted to the  
3 parties listed below in the following manner:

4 *First Class Mail*

*Interdepartmental Mail*

5 INTENTIONALLY BLANK

6  
7 \_\_\_\_\_  
8 John Griego  
9 Legal Assistant  
10 Administrative Hearings Office  
11 P.O. Box 6400  
Santa Fe, NM 87502