**No. 20-1104**

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IN THE

# Supreme Court of the United States

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MAUMEE INDIAN NATION,

*Petitioners,*

v.

WENDAT BAND OF HURON INDIANS,

*Respondent.*

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**On Writ of Certiorari To The United States Supreme Court**

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**BRIEF FOR THE PETITIONER**

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T1001

MAUMEE INDIAN NATION

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## Questions Presented

I. Did the Treaty with the Wendat abrogate the Treaty of Wauseon, or did the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) diminish the Maumee Reservation? If so, did the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) also diminish the Wendat Reservation, or is the Topanga Cession outside of Indian country?

II. Assuming the Topanga Cession is still in Indian country, does either the doctrine of Indian preemption or infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation?

I. Statement of the Case

A. Statement of the Facts

The Maumee Indian Nation and Wendat Band of Huron Indians are federally recognized tribes in the State of New Dakota with adjacent reservations and overlapping traditional land claims. The federal government entered into the Treaty of Wauseon with the Maumee Indian Nation in 1802, creating a reservation for "lands west of the Wapakoneta River." In 1908, Congress allotted surplus lands of the Maumee reservations in the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) for around two million dollars for about four hundred acres of land. The Treaty with the Wendat was signed in 1859, establishing a reservation for "lands east of the Wapakoneta River." The Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892), allotted surplus lands of the Wendat reservation for more than two million dollars for more than six-hundred and fifty acres of land.

The land at the center of this dispute, known as the Topanga Cession to the tribes and Door Prairie County to the State, is in question because the Wapakoneta River's natural movement redirected the water flow to about three miles west. Topanga Cession was west of the Wapakoneta River in 1802, but by 1859 it was east of the river. Both tribes have claimed exclusive rights over the Topanga Cession since 1937 but have avoided a determination by the federal government. There has been no dispute regarding civil or criminal jurisdiction, and the state has not levied any taxes on the lands in the Topanga Cession. It is unclear which Allotment Act declared the property in Topanga

Cession surplus lands. Neither tribe nor any tribal members selected an allotment within the Topanga Cession. Although many tribal members live there, they rent or own fee lands. In 1880 the Native population of Topanga Cession was 93%, and by 2010 the Native population declined to about 18%.

In December of 2013, the Wendat Band purchased 1,400 acres of fee land within the Topanga Cession. The Band then announced their wholly-owned Section 17 IRA Corporation, the Wendat Commercial Development Corporation's (WCDC) plans to develop the land into a combination residential and commercial facility. The WCDC facility would include low-income public housing units, an elder nursing home, a tribal cultural center, a tribal museum, and a shopping complex. The WCDC family would eventually support 350 jobs and $80million in gross sales annually.

The State of New Dakota tax in question is the Transaction Privilege Tax ("TPT"), which taxes gross proceeds of sales or income for the privilege of doing business in New Dakota. The TPT §212(4-6) recognizes the government-to-government relationship with tribes within the State of New Dakota in variously significant ways. First, §212(4) excludes tribal businesses operating within their reservation land held in federal trust from the TPT. Second, §212(5) remits proceeds of the TPT collected on reservations back to tribal governments that do not fall within §212(4)'s exemption. While New Dakota recognizes the ability for tribes to collect their tax, §212(5) states that the centralization and collection and enforcement is the most efficient means of providing the funds and services to tribes. Finally, §212(6) recognizes the Maumee's indigenous

land claim to the Topanga Cession, and half the TPT revenue collected in Door Prairie County, on lands located outside of Indian country, is remitted to the Maumee Nation.

B. Statement of Proceedings

The Maumee Nation filed a complaint against the Wendat Band on November 18, 2015, requesting a federal court Declaration that any development by the WCDC in the Topanga Cession would require a TPT license and payment of the tax because the WCDC is within the exterior boundaries of the Maumee Indian Reservation. Alternatively, the Maumee requested a Declaration that the Topanga Cession was not Indian country at all, presumably so one-half of the TPT tax would be remitted to it under §212(6).

The District Court determined that Congress did not diminish the Maumee Reservation and that New Dakota was permitted to levy the TPT tax on the WCDC as a nonmember tribal entity. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018). Using the balancing factors outlined in *Solem v. Bartlett*, 465 U.S. 463 (1984), the District Court found a lack of clear evidence of Congressional intent to abrogate the Treaty of Wauseon when it ratified the Treaty with the Wendat or through the Maumee Allotment Act of 1908. The District Court also found that Congress paid a certain sum for surplus lands and thus diminished the Wendat reservation through the Wendat Allotment Act in 1842. Further, the District Court found levying the TPT on the WCDC facility was not federally preempted nor a state infringement on the Wendat tribal government according to standards established in

*Williams v. Lee, 358 U.S. 217 (1959)* and *Apache Tribe v. Bracker,* 448 U.S. 136 (1980).

The Thirteenth Circuit Court of Appeals reversed the District Court because it found that Congress diminished the Maumee Reservation. Additionally, the Circuit Court held that the Topanga Cession was apart of the Wendat Reservation; therefore, New Dakota could not levy the TPT on a Wendat Tribal Entity within the Wendat Reservation as it interfered with Wendat tribal sovereignty. *Wendat Band of Huron Indians v. Maumee Indian Nation, w*(13th Cir. 2020). The Circuit Court found the language within the Maume Allotment Act of 1908 to be ambiguous while finding the Treaty with the Wendat of 1859 abrogated the Maumee's claim to the Topanga Cession. The Circuit Court also failed to find any cession language sufficient to diminish the Wendat Reservation within the Wendat Allotment Act. Further, the Circuit Court found that the WCDC facility was not on land held in trust by the federal government and was not exempt from TPT in §212(4). However, the Circuit Court also found that the Wendat Band proved the TPT would infringe on their sovereignty as established in *Williams v. Lee*, 358 U.S. 217 (1959) and should be subject to Indian preemption *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

## II. Summary of Argument

Congress opened the Topanga Cession to allotment, but the terriroty remains within the exterior boundaries of the Maumee Reservation as explicitly fixed in the W ("Wauseon Treaty"). The Treaty with the Wendat ("Wendat Treaty')  did not abrogate

the Wauseon Treaty. The Wendat Treaty does not mention the Maumee Indian Reservation, the reservation boundaries, or the Maumee Indian Nation. The Court has "required that Congress' intention to abrogate Indian treaty rights be clear and plain." Cohen 223; see also *United States v. Santa Fe Pacific R. Co*., 314 U.S. 339, 353 (1941). Without explicit statutory language, courts are "extremely reluctant to find congressional abrogation of treaty rights" *Washington v. Washington Commercial Passenger Fishing Vessel Assn*., 443 U.S. 658, 690 (1979). Further, under the "fixed boundary theory," river boundaries remain fixed as of a particular historical date due to important historical factors requiring Congress to explicitly change the original reservation boundaries set in the Wauseon Treaty. See, e.g., *Potomac Shores, Inc.*, 219 Md. App. at 35, 98 A. 3d at 1052.

The Maumee Allotment did not diminish the Maumee reservation. The Maumee Allotment Act of 1908 had ambiguous language, without a commitment from Congress to unconditionally compensate the tribe for open lands, and legislative history provides the purpose of the Act was only the first step to diminishment but needed further Congressional action and appropriations to change the exterior boundaries of the reservation. First, "the most probative evidence of congressional intent is the statutory language used to open the Indian lands." *Id.* Second, the Court looks to legislative history and the surrounding circumstances of a surplus land act to determine the "contemporaneous understanding" of the act's purpose and effect. *Id.* Finally, although far less probative, events after the passage of a surplus land act may be examined "to decipher Congress's intentions." *United States v. Webb*, 219 F.3d 1127, 1132 (9th Cir.

2000). Allotment acts were “often the first step in a plan ultimately aimed at disestablishment,” *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020). However, “just as wishes are not laws, future plans aren’t either.” Although Congress may have intended to create the conditions for disestablishment, allotment can not be equated to disestablishment. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2465 (2020).

The Wendat Allotment Diminished the Wendat Reservation as the diminishment language was accompanied by an unconditional commitment from Congress to compensate the Wendat for opened lands, showing a contemporaneous understanding of Congressional intent to diminish the reservation. The Court may find diminishment when considering “the manner in which the transaction was negotiated and the legislative reports presented to Congress unequivocally reveal a contemporaneous understanding by Congress that the reservation would shrink as a result of the legislation.” *Id.* Further, when Congress accompanies the language of cession by an unconditional commitment to compensate the tribe for the opening of their lands, “there is an almost insurmountable presumption that Congress meant for the tribe’s reservation to be diminished.” *Id.* See *DeCoteau v. District County* Court, supra, at 447-448. The Topanga Cession remains within the exterior boundaries of the Maumee Reservation and consequently is Indian Country. In the alternative, the Topanga Cession is outside the Wendat Reservation because Congress diminished the reservation and adequately compensated the Wendat Indians by appropriations within the allotment act.

The TPT is not an infringement on tribal sovereignty nor is it preempted by federal law. A state is prohibited from levying a tax that is preempted by federal or tribal interests, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); nor may a state impose a tax that infringes upon the right of reservation Indians, Williams v. Lee, 358 U.S. 217 (1959). When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable. The state's regulatory interest is likely to be minimal, and the federal interest in encouraging tribal self-government is at its strongest. Moe v. Salish & Kootenai Tribes, 425 U.S. 436, 480-81 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

New Dakota's application of the TPT on its Indian reservations complies with federal law, as the United States Code nor the Code of Federal Regulation preempts New Dakota from levying its tax. Furthermore, New Dakota exempts "Indian tribe[s] or tribal business[es] operating within its own reservation on land held in trust" from the TPT. 4 N.D.C. § 212(4). Consequently, New Dakota's "member Indian exemption" from the TPT is consistent with federal law; states cannot generally levy a tax on member Indians with Indian country. The Wauseon Treaty reserves to the Maumee Indians a right to establish trading posts within a six mile square where the Wapakoneta River meets Fort Crosby and the portage of the Wapakoneta River into the Great Lake of the North. Treaty of Wauseon, Section 4, Oct. 4, 7 Stat. 1404. In applying the canons of construction, the Maumee Indians would have understood that they had the right to engage in trade and commerce within the Topanga Cession, which includes taxes levied on the gross proceeds of sales or gross business income. The Maumee Indians maintain an explicit

treaty right to trade and commerce within the Topanga Cession. As a result, New Dakota is obligated to implement the TPT in a manner that is consistent with the terms of the Wauseon Treaty and the federal trust relationship. In reviewing the TPT scheme, New Dakota is deploying its tax power in a manner that supplements, not infringing upon, tribal sovereignty.

## III. Argument

### A. Abrogation & Diminishment

The Wendat Treaty did not abrogate the Wauseon Treaty nor did the Maumee Allotment Act diminish the Maumee Reservation, consequently the Topanga Cession is within Indian country. Further, the Wendat Allotment Act diminished the Wendat Reservation.

#### 1. The Wendat Treaty did not abrogate the Wauseon Treaty.

Congress has plenary authority "to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). The Court has "required that Congress's intention to abrogate Indian treaty rights be clear and plain." *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353 (1941). Without explicit statutory language, courts are, "extremely reluctant to find congressional abrogation of treaty rights."

*Washington v. Washington Commercial Passenger Fishing Vessel Assn*., 443 U.S. 658, 690 (1979). Treaty abrogation requires an express statement from Congress and courts cannot construe statutes in "a backhanded way." *Menominee Tribe v. United States*, 391 U.S., at 412. Further, in the absence of an explicit statement, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Pigeon River Co. v. Cox Co*., 291 U.S. 138, 160 (1934). According to the Court, clear evidence indicates that "Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 106 S. Ct. 2216 (1986).

When language is ambiguous, the Court has considered evidence of congressional intent to abrogate treaty rights when it is accompanied with an unconditional commitment to compensate the tribe for relinquished lands or the legislative events surrounding the passage of the congressional action. *Solem v. Bartlett*, 465 U.S. 463 (1984). In *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020), the Court determined that if there is no clear statement addressing treaty abrogation, there is no need to look for evidence of abrogation in the legislative history. "When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us." *Id.* Consequently, *McGirt* changed the three considerations in *Solem*. First, the Court considers the plain language of the congressional act. The Court then evaluates legislative history to determine if an unconditional commitment to compensate the tribe exists or if the history surrounding the Act's passage addresses treaty abrogation. *Id.* If there is no statement on abrogation, then it is not ambiguous. *Id.*

"If Congress wishes to break the promise of a reservation, it must say so," as "[d]isestablishment has never required any particular form of words. But it does require that Congress clearly expressed its intent to do so, commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Id.* Therefore, congressional acts that reference a cession, unconditional commitment to compensate the Indian tribe for its opened land, directing tribal lands be restored to the public domain, or referring to the reservation as being discontinued, abolished, or vacated within a statute provides enough ambiguity to look to the congressional history for further evidence of treaty abrogation. *Id.*

Historically, the U.S. Supreme Court employs essential rules of interpretation known as the Indian Canons of Construction. Under the canons of construction, there are three principles used to determine the legal meaning of any language used in federal documents involving Indians. First, the language is construed as the Indians would have understood it when Congress has expressed clear and unambiguous intent by its action, the results will be binding on a tribe and the federal government. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Jones v. Meehan*, 175 U.S. 1, 10-12 (1866); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938). Second, Indian treaties and statutes must be construed liberally in favor of the Indians. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). Finally, the Court must resolve ambiguities in the language being considered must be resolved in favor of the Indians. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174 (1973). These canons "do not turn on the ebb and flow of judicial solicitude" towards tribal governments but "have quasi-constitutional

status; they provide an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation." Cohen's Handbook of Federal Indian Law§ 2.02[2], at 118-19 (Nell Jessup Newton, ed., 2012). The canons recognize "the standard principles of statutory interpretation do not have their usual force in cases involving Indian law." *Montana v Blackfeet Tribe*, 471 U.S. 759, 766 (1985). The canons consider the circumstances that the government-to-government documents and agreements were not drafted by tribes and are "rooted in the unique trust relationship between US and Indians" *Oneida Cty. v. Oneida Indian Nation*, 470 U.S. 226, 257 (1985). They also aim to correct the nature of past relationships with tribal governments and should ensure "the language used in treaties [and statutes] with the Indians should never be construed to their prejudice." *Worcester v Georgia*, 31 U.S. 515, 582 (1832).

Central to this dispute is the canons of construction and the recognized theories associated with riparian boundaries between sovereigns. The canons are triggered because federal acts involving the Maumee Nation and Wendat Nation impacts the boundary issue. Outside of federal Indian law, the U.S. Supreme Court utilized various interpretative theories when considering disputes between states, or a state and a foreign country, in which waterways describe borders. See *Potomac Shores, Inc. v. River Riders, Inc.*, 219 Md. 98 A.3d 1048, 1051 (Md. 2014). Under the fixed boundary theory, river boundaries remain fixed as of a particular historical date due to important historical factors. *Id.* at 1052; see, e.g., *First Nat. Bank of Missouri Valley, Iowa v. McFerrin*, 142 Neb. 617, 9 N.W.2d 166 (1943). The Court discussed this theory at length in *Ohio v. Kentucky*; the states disputed whether the original boundary between the states was the

current or the historic low-water mark of the Ohio River's northern bank. 471 U.S. 153 (1985). History is of great import in this theory because "historical antecedents fix the boundary," as opposed to characteristics of the river itself. Thus, historical analysis of enabling acts and chain of title is required because "dominion and jurisdiction continue as they existed at the time [the state] was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river." *Id.* at 338. In *Ohio*, the Court focused on the fact that Kentucky was the successor in interest from Virginia of "lands to the north-west of the river Ohio" *Id.* (citing the Virginia Act of 1783, in 11 W. Hening, Laws of Virginia 326, 327 (1823)). Virginia ceded those lands to the United States, which in turn granted them to the new state of Kentucky, entitling it to the river's expanse. *Id.* Therefore, under the fixed boundary theory, accretion and avulsion events are not determinative. Instead, the events leading to the creation of the boundary determine historically fixed points.

Based on a historical review, Appellee wrongfully believes the Wendat Treaty abrogated the Wauseon Treaty. On February 8, 1802, Congress enacted legislation ratifying the Wauseon Treaty, which established the exterior boundaries of the Maumee Indian Reservation. Treaty of Wauseon, Oct. 4, 7 Stat. 1404. Under the Wauseon Treaty, the Wapakoneta River acts as the Reservation's eastern boundary, "between Fort Crosby to the North and the Oyate Territory to the South." *Id.* at art. III. On November 19, 1859, Congress enacted legislation ratifying the Wendat Treaty to set the exterior boundaries of the Wendat Indian Reservation. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. Article I of the Wendat Treaty reserves "those lands East of the Wapakoneta River" for

the Wendat Nation's western boundary. *Id.* A plain reading of the Wendat Treaty does not describe the location of the Wapakoneta River. Instead, the Wendat Nation ceded to the United States their title and interest in lands west of the Wapakoneta River, which the Wendat Indians knew to be the Maumee Indian Reservation. Therefore, the Wendat Treaty does not raise to the level of "clear and plain" abrogation of the Wauseon Treaty. Here, as in *McGirt*, if Congress intended to abrogate the Wauseon Treaty, it would have included it in the 1859 Act ratifying the Wendat Treaty. Instead, Congress continued its solemn commitment to the Maumee Nation that "none of their tribes shall presume to settle upon the same, or any part of [the Maumee Reservation]." However, given the nature of the underlying issues, this analysis requires an even more nuanced analysis due to the specific domestic and international rules triggered when a waterway defines a sovereign's boundary.

The Maumee Nation maintains that the original boundary of its Reservation should remain fixed in place consistent with the exterior boundaries precisely defined by Congress' 1802 Act ratifying the Wauseon Treaty. Under this interpretation, the Topanga Cession remains a part of the Maumee Reservation, so long as the other boundary defining provisions of the Wauseon Treaty are satisfied. The primary purpose of the 1802 Act ratifying the Wauseon Treaty was to establish permanently fixed boundaries for the Maumee Indians by identifying a specific territorial jurisdiction. A plain reading of the entire Wauseon Treaty supports this holding. Article III sets "the boundary line between the United States and Maumee Nation." Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. Article IV explicitly commands the United States to "allot all the lands contained within

the said lines to the Maumee" and that the lands allotted to the "Maumee Nation *as now* lived thereon." *Id.* (emphasis added). Furthermore, Article IV sets aside a "six mile square at the Wapakoneta river where it meets Fort Crosby, and the same at the portage on that branch of the river into the Great Lake of the North" to be "saved" and "reserved" for the Maumee Nation for the "establishment of trading posts." *Id.* And, perhaps most importantly, Article VI expressly states that the Maumee Indians shall have the lands "described in the third article" and that "none of [the United States'] tribes shall presume to settle upon the same, or any part of it." *Id.* Thus, when read as the Maumee would have understood it at the time, the Act sets the riparian boundary explicitly at the time of the 1802 Act ratifying the Treaty while explicitly reserving rights in the land at issue to the Maumee for trade and commerce. Therefore, it is rational to apply the fixed boundary theory to this dispute because a plain reading of the Wauseon Treaty, as the Maumee would have understood, is that the Wauseon Treaty set the Maumee Reservation boundaries in 1802.

Furthermore, the Wendat Treaty's language lacks clear intent to cede the Maumee Nation's geopolitical territory in the Topanga "Cession" to the Wendat Nation. Instead, the Wendat Nation knew their proposed reservation would share its western boundary with the Maumee Indian Reservation. When reading both treaties together, the Wapakoneta River boundary was fixed by Congress with the 1802 Act ratifying the Wauseon Treaty. Then Congress referenced that fixed boundary in the Wendat Treaty to establish the Wendat Reservation's western border. To support this finding, *Solem* instructs a review of congressional intent to abrogate treaty rights. Here, Congress did not

believe it abrogated the Wauseon Treaty with the Wendat Treaty in 1859 because it passed the Maumee Allotment Act in 1908. This congressional act occurred after the Wendat Treaty's ratification, which is evidence that Congress understood that it did not abrogate the Wauseon Treaty. Accordingly, the Wendat Treaty did not abrogate the Wauseon Treaty.

2. The Maumee Allotment Act did not diminish the Maumee Indian Reservation.

Similar to the precedent for treaty abrogation, reservation diminishment requires a display of Congressional intent within the allotment acts' statutory language. Only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation, and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise. See *United States v. Celestine*, 215 U.S. 278, 285 (1909). In *Solem v. Bartlett*, 465 U.S. 463 (1984), the Court reviewed three considerations when determining congressional intention to diminish a reservation. First, "the most probative evidence of congressional intent is the statutory language used to open the Indian lands." *Id.* Second, the Court looks to legislative history and the surrounding circumstances of a surplus land act to determine the "contemporaneous understanding" of the act's purpose and effect. *Id.* Finally, although far less probative, events after the passage of a surplus land act may be examined "to decipher Congress's intentions." *United States v. Webb*, 219 F.3d 1127, 1132 (9th Cir. 2000). Where there is conflicting language, isolated phrases such as "opening lands" are hardly dispositive of

diminishment. *Solem,* 465 US 463. Further, when the language of cession is accompanied by an unconditional Congressional commitment to compensate the tribe for the opening of their lands, “there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.” *Id.* However, if the language is limited to authorizing the federal government to sell and dispose of lands for the benefit of the tribe, it only suggests that Congress was authorizing the Department to act as the tribe’s sales agent. *Id.* The Court may find diminishment when considering “the manner in which the transaction was negotiated and the legislative reports presented to Congress unequivocally reveal a contemporaneous understanding by Congress that the reservation would shrink as a result of the legislation.” *Id.*

However, as stated above, the *McGirt* decision altered this rule and requires some reference to diminishment within the Act before seeking evidence in the legislative history surrounding the passage of the act. 140 S. Ct. 2452, 2462 (2020). *McGirt* is applicable to discussions of diminishment as it discussed that allotment acts were “often the first step in a plan ultimatly aimed at disestablishment,” *Id.* at 2464. As in *Mattz*, allotment was found to be a Congressional action made before explicit diminishment, “[w]hen all the lands had been allotted and the trust expired, the reservation could be abolished.” 412 U.S. 481, 496 (1973). However, “just as wishes are not laws, future plans aren’t either.” Although Congress may have intended to create the conditions for disestablishment, allotment can not be equated to disestablishment. *McGirt*, 140 S. Ct. at 2465.

In this case, the Maumee Allotment Act contains isolated phrases that may point to diminishment, but are ambiguous. The Act says "[t]he Indians have agreed to consider the entire eastern quarter surplus and to cede their interest in the surplus lands to the United States where it may be returned the public domain by way of this act." Treaty of Wauseon, Section 1, Oct. 4, 1801, 7 Stat. 1404. And, "[t]hat the lands shall be disposed of by proclamation under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President," the Act continues, "Provided, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area described in section one of this Act to relinquish such allotment and to receive in lieu thereof a sum of eight-hundred dollars." (*Id*. Section 2) This language contradicts later language in the final section in the Act, "[t]hat nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof as herein provided." (*Id*. Section 9).

As in *Solem,* the isolated phrases like "the lands shall be disposed of… open to settlement…and relinquish such allotment" are hardly dispositive of diminishment. 465 U.S. 463 (1984). Further, similar to *Solem,* the language of the Act only authorizes the

federal administration to act as the Maumee's sales agent when it stated "[t]hat nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof as herein provided" (7 Stat. at Section 9). Further, the Act authorizes the United States to survey the lands and allot them in the future. (7 Stat. at Section 2). The contradicting language creates ambiguity about the Congressional intention of the Maumee Allotment Act, which satisfies the *McGirt* rule requiring ambiguity to move on to the second and third considerations present in *Solem. McGirt*, 140 S. Ct. at 2462.

The second consideration in *Solem,* language regarding an unconditional compensation commitment from Congress, is present within the Act, "[t]hat nothing in this law provides for the unconditional payment of any sum to the Indians." (7 Stat. at Section 4). Section 4 directly points to a lack of Congressional intent to diminish the Maumee reservation. Congress only committed funding allocations for sections of the reservation for the use of common schools that is intended to be transferred to the State of New Dakota. (7 Stat. at Section 7). The third consideration in *Solem*, when trying to determine diminishment, is evidence within the Congressional record. Here, as in *McGirt* and *Mattz,* the congressional record reflects that Congress passed the Maumee Allottment Act to erode the trust responsibility in anticipation of extinguishing Indian country. It was

communicated to Congress that the value of the lands were not yet determined. *Maumee Allotment Act*, 42 Cong. Rec. 2346 (1908). It was even communicated that the unsold surplus lands would remain Indian Country (*Id.*) These congressional comments illustrates that Congress did not authorize appropriations with the Maumee Allotment Act, and although expected all surplus lands to be sold, there was some understanding in Congress that if not sold it would remain as Indian Country. Further, there was also evidence on the congressional record that the Maumee Allotment Act was a foundational beginning to diminishment, but the act itself did not diminish the reservation. The congressional record reflects, "I believe it has been very carefully prepared. Inasmuch as it is necessary to begin at the very foundation in this case and to provide, first, for allotments, then for opening the lands to settlement, and for reservation of coal, the bill is quite a long one. I think the committee has given the bill careful consideration, and it seems to me its provisions are excellent. It does justice 26 to the Indians, and I believe will promote the interests of the incoming settlers." (*Id*. 2347). "In my judgment this is a meritorious bill, and should receive universal approval. It makes ample provision for the protection of the rights of the Indians." (*Id.* 2348). This evidence on the record points to Congress's future plans to diminish the reservation, but fails to establish diminishment within the Maumee Allotment Act of 1908. The Maumee Reservation survived diminishment and continues authority and jurisdiction within the State of New Dakota today.

Although the Maumee reservation survived allotment, the clear language of the act opened the Topanga Cession up for allotment. The first Section of the Act reads "The

Indians have agreed to consider the entire eastern quarter surplus and to cede their interest in the surplus lands to the United States where it may be returned to the public domain by way of this act" (Section 1). At the time of the Act, the eastern quarter of the Maumee reservation would include the Topanga Cession. Further the Act authorizes the Secretary of Interior to survey "all the lands embraced within said reservation, and to cause an examination to made of the lands by experts of the Geological Survey, and if there be found any lands bearing coal, the said Secretary is hereby authorized to reserve them from allotment or disposition" (Section 2). According to *Solem,* this statutory language is probative evidence of congressional understanding to allot the land in question within the Act for development. The State of New Dakota recognized this sacrifice of the Maumee's traditional territory for the benefit of public domain within their tax law, "(6). Door Prairie County. In recognition of the valuable mineral interests given up by the Maumee Indian Nation, half of the Transaction Privilege Tax collected from all businesses in Door Prairie County that are not located in Indian country (1.5%) will be remitted to that tribe". (State of New Dakota Tax Code §212(6)). However, as stated above, Congress clearly, unambiguously, and expressly established the western bank of the Wapakoneta River between Fort Crosby and the Oyate Territory as the exterior boundary of the Maumee Reservation and never explicitly addressed the boundary of the reservation through Congressional action again. Although Congress allotted the land within the Topanga Cession, it is still within the exterior boundaries of the Maumee Reservation.

3. The Wendat Allotment Act diminished the Wendat Indian Reservation.

As stated above, there are three considerations when determining congressional intention to diminish a reservation *Solem v. Bartlett*, 465 U.S. 463 (1984). First, the most probative evidence of congressional intent to diminish a reservation is the statutory language within the allotment act such as explicit reference to cession or surrender of tribal interests, however isolated phrases such as "opening lands" are hardly dispositive of diminishment. *Id.* The second *Solem* consideration, and most important to this analysis, is the inclusion of a unconditional commitment to compensate the Tribe accompanied by language of cession illustrates an "almost insurmountable presumption that Congress m ant for the tribe's reservation to be diminished" *Id.* See *DeCoteau v. District County* Court, supra, at 447-448. Finally, if express language and an unconditional commitment to compensate the tribe is lacking the courts may infer diminishment when considering, "the manner in which the transaction was negotiated and the legislative reports presented to Congress unequivocally reveal a contemporaneous understanding by Congress that the reservation would shrink as a result of the legislation." *Id.* However, as stated above, the recent *McGirt* decision has altered this rule and requires some reference to diminishment within the Act before looking to an unconditional commitment to compensate the tribe and the legislative history surrounding the passage of the act. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020). *McGirt* is especially applicable to discussions of diminishment as it discussed that allotment acts were "often the first step in a plan ultimatly aimed at disestablishment," *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020). As in *Mattz*, only after allotment "[w]hen all

the lands had been allotted and the trust expired, the reservation could be abolished." 412 U. S., at 496, 93 S. Ct. 2245, 37 L. Ed. 2d 92.

In the Wendat Allotment Act "All lands not selected within one year of the survey's completion shall be declared surplus lands and opened to settlement". (Section 1) As in *Solem,* this isolated phrase is hardly dispositive of diminishment. *Solem v. Bartlett*, 465 U.S. 463 (1984). The ambiguous language is followed by an unconditional commitment to pay, "total and complete compensation." (Section 2). When there is a unconditional commitment for compensation, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem.* The Act continues to dictate, "That all money accruing from the disposal of said lands in conformity with the provisions of this act shall be placed in the Treasury of the United States to the credit of all the Wendat Band of Indians as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years" (Section 3), which bolsters the argument that Congress intended to diminish the reservation.

Evidence within the legislative record illustrates a Congressional understanding that the Act intended to diminish the Wendat reservation. First, the long title of the Act reads, "An act for the relief and civilization of the Wendat Band of Huron Indians in the State of New Dakota." (1777). Similar language using this title suggests the extinguishment of the trust responsibility between the federal government and Indian tribes. (I don't have a cite for this might as well delete). The record continues to describe

the extinguishment of the trust responsibility and the assertion of state jurisdiction, ""rations, annuities, and tribal negotiations, with the agents, inspectors, and commissioners who distribute and conduct them -must pass away when the Indian has become a citizen, secure in the individual ownership of a farm from which he derives his subsistence by his own labor, protected by and subordinate to the laws which govern the white man, and provided by the General Government or by the local communities in which he lives with the means of educating his children. When an Indian becomes a citizen in an organized State or Territory his relation to the General Government ceases, in great measure, to be that of a ward; but the General Government ought not at once to put upon the State or Territory the burden of caring for the Indian." *The Wendat Allotment Act*, 23 Cong. Rec. 1777, 1778 (1892). During the passage of this act, a report from the Department of Interior suggests that the Wendat and federal government was in the middle of the allotment process, and the Wendat Allotment Act was needed to appropriate the necessary funds in order to complete allotment. (*Id.* at 1777). " By the opening of this reservation more than 2,000,000 acres of valuable land will be added to the public domain…This matter is presented with request for favorable consideration, in order if possible to complete the work and open the lands to settlement in the early spring." (*Id.* at 1777.) Further floor testimony illustrates Congressional intention to fully compensate the Wendat Band for surplus lands and did not want to delay an appropriations to diminish the reservation, "Deserving and impatient settlers are waiting to occupy these lands, and I urgently recommend that a special deficiency appropriation be promptly made of the small amount needed, so that the allotments may be completed

and the surplus lands opened in time to permit the settlers to get upon their homesteads in the early spring. I urge we act today to concur with the unanimous voice of our Senate colleagues approve the allotment bill before us." (*Id.* at 1779).

4. The Topanga Cession is within Indian Country.

A. The Maumee Allotment Act of 1908 did not diminish the exterior boundaries of the Maumee Reservation and although the Topanga Cession was opened to allotment it is still within the exterior boundaries of the Maumee Reservation.

As a doctrinal matter, State's do not have jurisdiction over lands opened to allotment unless the Act freed that land of its reservation status and thereby diminished the reservation boundaries *Solem,* 465 U.S. 463 (1984). Federal, state, and tribal authorities share jurisdiction over these lands if the Act did not diminish the existing Indian reservation because the entire opened area is still Indian country. *Id.* Under the fixed boundary theory, river boundaries remain fixed as of a particular historical date due to important historical factors. *Potomac Shores, Inc.*, 219 Md. App. at 35, 98 A. 3d at 1052. Historical analysis of Congressional action required because "dominion and jurisdiction continue as they existed at the time [the state] was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river." *Ohio.* at 338. Under the fixed boundary theory, accretion and avulsion are not determinative. Instead, the events leading to the creation of the boundary determine historically fixed points. *Id.* Diminishment of reservation boundaries can be found " When such language of cession is buttressed by an unconditional commitment from Congress to compensate

the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem*

Here, as argued above the, The primary purpose of the 1802 Act ratifying the Wauseon Treaty was to establish permanently fixed boundaries for the Maumee Indians by identifying a specific territorial jurisdiction. This reservation boundary was explicitly established within the Treaty of Waeson and was never plainly addressed in the Wendat, Maumee Allotment Act of 1908, or any Congressional action again. The Topanga Cession is within the Treaty's specific boundary provision, regardless of the river's movement, and thus is within Indian Country.

Alternatively, if the court finds that the Maumee's reservation was diminished, then the Topanga Cession is outside of Indian Country because the Wendat Reservation was diminished through allotment due to an unconditional congressional commitment to compensate the Wendat tribe within the Wendat Allotment Act. Further, although owned by a tribe, the WCDC Facility is located on non-trust fee-simple lands outside of the boundary of either the Maumee or Wendat Reservations.

B. Preemption & Infringement

Based on the above analysis, the Topanga Cession is still in Indian country, which subjects the TPT to the doctrines of Indian preemption and infringement, as the United States' constitutional system binds the State of New Dakota to federal Indian law. Historically, Congress admitted states into the Union with a requirement that the state

disclaim all title to Indian or Indian tribes' lands and that Indian lands were to remain under Congress's absolute jurisdiction. See e.g. 25 Stat. 676, ch. 180, 276-84, enacted February 22, 1889. Therefore, consistent with the terms on which Congress admitted states into the Union, all lands owned or held by any Indian or Indian tribes within the State of New Dakota remain under the absolute jurisdiction and control of Congress. However, this congressional requirement does not displace New Dakota's state power. See, e.g., *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Instead, at statehood, Congress restrained New Dakota from exercising exclusive jurisdiction over its Indian reservations, absent a congressional grant. With respect to state power, Indian treaties are regarded as a part of the law of New Dakota as much as the state's own laws and Constitution, and are effective and binding on the state legislature and are superior to the reserved powers of the state, including the police power. See, e.g., *State v. Shook*, 67 P.3d 863 (Mont. 2002). As a result, a state may not impose a tax that is preempted by federal or tribal interests, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), nor may a state levy a tax that infringes upon the rights of reservation Indians, *Williams v. Lee*, 358 U.S. 217, 220 (1959). Consequently, the doctrines are independent of each other, so either standing alone can be sufficient for holding a state law inapplicable within Indian country, and designed to determine state power relative to the federal trust relationship. Here, New Dakota is permitted to levy its TPT against a Wendat tribal corporation because the doctrines of preemption and infringement do not preclude the tax.

1. The Doctrine of Preemption does not prevent New Dakota from collecting its TPT Tax.

A state is prohibited from levying a tax that is preempted by federal or tribal interests. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). State authority over non-Indians acting on Indian reservations is preempted even though Congress has offered no explicit statement on the subject. *Williams*, 358 U.S. at 220; *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971). When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 436, 480-81 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). The tradition of Indian sovereignty over its reservation and tribal members must inform the determination whether the exercise of state authority is preempted by federal law. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976). Tribal governments possess the authority to tax on-reservation business activity carried out by tribal members and nonmembers. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985). However, nonmember Indians residing on an Indian reservation are subject to state income tax. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995). Therefore, when the federal government's interest in promoting the tribal trust responsibility is pervasive, a state tax is preempted by federal law as it would obstruct federal policies. *Id.*

For example, in *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), the Court struck down an attempt by the State of Arizona to levy a 2% transaction privilege tax on gross receipts of a non-Indian trading post on the Navajo reservation. The Court in *Warren Trading Post,* held that the state's power to tax the transactions had been barred by Congress because the trading post operated under a federal license and an extensive federal regulatory scheme existed, beginning with the 1790 Nonintercouse Act. *Id.* In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), Arizona levied its personal income tax on Indians in Indian country, arguing that there were no "governing acts of Congress" dealing with taxing Indian income earned on the reservation. However, the Court held that Arizona could not impose its tax on the reservation because the language of the tribe's treaty preempted Arizona's taxing power. *Id.* Whereas, in *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980), the Court determined that a non-licensed Indian trader without a permanent place of business on the reservation is not subject to a state transactional tax on the reservation when the transaction is subject to federal regulation. Therefore, a certain set of facts must be present to determine if a state is prohibited from exercising its taxing authority on the reservation.

New Dakota's application of the TPT on its Indian reservations complies with federal law because, as supported by the record, the United States Code nor the Code of Federal Regulation preempts New Dakota from lying its tax. Furthermore, New Dakota exempts "Indian tribe[s] or tribal business[es] operating within its own reservation on land held in trust" from the TPT. 4 N.D.C. § 212(4). This exemption for the TPT is

consistent with *Moe*, which restricted states from taxing member Indian activity within their reservation. Lastly, since the Topanga Cession is outside of the Wendat Indian Reservation, the state may tax Wendat Indians' income, even if the Wendats are doing business on the Maumee Reservation, which is consistent with the *Oklahoma Tax Comm'n* holding. Consequently, New Dakota's TPT is not preempted by federal law.

2. The Doctrine of Infringement does not bar New Dakota from collecting its TPT Tax.

Long ago the Court departed from the view set down in *Worcester* that "the laws of [a State] can have no force" within reservation boundaries. *Bracker*, 448 U.S. at 141. As a result, there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members. *Id.* The status of the tribes has been described as "an anomalous one and of complex character," for despite their partial assimilation into American culture, the tribes have retained "a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus are not brought under the laws of the Union or of the State within whose limits they resided." *McClanahan*, 411 U.S. at 173 (1973) (quoting *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886)). The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in American jurisprudence that they have provided an important "backdrop," *McClanahan*,

411 U.S. at 172, against which vague or ambiguous federal enactments must always be measured, *Bracker*, 448 U.S. at 143. Therefore, the tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law. *Moe*, 425 U.S. at 475; *Bracker,* 448 U.S. at 143. The Court has repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. *Bracker*, 448 U.S. at 143. Therefore, the Court rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required. *Warren Trading Post Co*., 380 U.S. at 387. At the same time any applicable regulatory interest of the State must be given weight, *McClanahan*, 411 U.S. at 171, and "automatic exemptions as a matter of constitutional law" are unusual. *Moe*, 425 U.S., at 481; *Bracker*, 448 U.S. at 144. When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. *Moe*, 425 U.S. at 480-481; *Bracker*, 448 U.S. at 144.

With respect to state power, the State of Montana's Supreme Court provides insight with its *Shook* decision into how a state can supplement, and not infringe on the sovereign rights of its Indian tribes. 67 P.3d 863 (Mont. 2002). State policies that reflect and further the federal sovereign-to-sovereign relationship with Indians tribes are permissible. *Id.* at 867. Specifically, in *Shook*, the State of Montana regulated hunting

activities of non-tribal members on its Indian reservations because hunting regulations were not precluded by an act of Congress or tribal self-governance matters. *Id.* Montana limited big game hunting on its Indian reservations to tribal members only, closing the hunting season to non-Indian. *Id.* at 865. The *Shook* Court concluded Montana's closure of big game hunting to non-Indians on its reservations is to preserve the Indians' rights to hunt and fish. *Id.* In this light, Montana engaged in a sovereign-to-sovereign relationship with its Indian tribes analogous to the federal trust relationship. As such, Montana engages in a privileged extension of the federal trust relationship with its Indian tribes when an issue involves the rights of Indians. *Id.* However, this privileged extension only applies to federally-recognized Indian tribes, not individual Indians or state-recognized tribes. As a result, the *Shook* Court upheld Montana's hunting regulations as state policies that rationally reflected and furthered the federal trust relationship with Indian tribes. *Id.* at 868. In sum, Montana uses federalism to permit the implementation of state policies that advance the federal government's obligation toward Indians.

Here, the facts are similar to those in *Shook*. First, New Dakota's TPT involves a reserved right of the Maumee Indian Tribe. Specifically, the Wauseon Treaty reserves to the Maumee Indians a right to establish trading posts within a six mile square where the Wapakoneta River meets Fort Crosby and the portage of the Wapakoneta River into the Great Lake of the North. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. In applying the canons of construction, the Maumee Indians would have understood that they had the right to engage in trade and commerce within the Topanga Cession, which includes an interest in taxes levied on the gross proceeds of sales or gross business income. The Maumee

Indians maintain an explicit treaty right to trade and commerce within the Topanga Cession. As a result, New Dakota is obligated to implement the TPT in a manner that is consistent with the terms of the Wauseon Treaty and the federal trust relationship. Consequently, New Dakota's TPT scheme must acknowledge the Maumee's reserved right of trade within the Topanga Cession or it will violate the doctrine of infringement. New Dakota. In reviewing the TPT scheme, New Dakota "[i]n recognition of the valuable mineral interests given up by the Maumee Indian Nation, half of the [TPT] collected from all businesses in Door Prairie County that *are not located* in Indian country (1.5%) will be remitted to that tribe." § 212(6) (emphasis added). The TPT is a tax levied on the sales and income of non-Indian businesses operating on fee land within an Indian reservation. § 212(4). New Dakota "in recognition of [the unique] relationship [between New Dakota and its twelve constituent Indian tribes], the State...will remit to each tribe the proceeds of the [TPT] collected from all entities operating on their respective reservations that do not fall within the [Indian] exemption" § 212(5). Under federal law, New Dakota is not obligated to remit tax revenue collected from non-Indians on Indian reservations to that Indian tribe. Therefore, like Montana in *Shook*, New Dakota is implementing a state policy that rationally furthers Indians' right to self government by raising revenue for its tribal governments to operate. Further, New Dakota recognizes that "each Tribe could collect this tax itself," but "the centralization of collection and enforcement" "is the most efficient means of providing these funds to the tribes." *Id*. This section of the TPT is explicitly about tribal-state cooperation and does not involve the United States Government. New Dakota is simply stating it possesses the necessary institutions and technical knowledge to collect

the tax and will do so on the part of its Indian tribes. As a result, New Dakota made a political decision to deploy its state power in a manner, similar to Montana, to protect the rights of Indian self-government. Accordingly, New Dakota is permitted to deploy its state power to levy the TPT on any commercial enterprise, not statutorily exempted, on the Wendat's 1,400 acre parcel within the Topanga Cession.

## V. Conclusion

Based upon the above argument, the Court should reverse the Thirteenth Circuit's holding and declare the Topanga Cession to be within the Maumee Indian Reservation and that the development of any commercial enterprise by the WCDC, with more than $5,000 in gross sales, is required to obtain the TPT license and pay the (3%) tax to the State of New Dakota and then remitted to the Maumee Indian Nation.