No. 20-1104

IN THE

Supreme Court of the United States

MAUMEE INDIAN NATION,
Petitioners,
v.

WENDAT BAND OF HURON INDIANS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Maumee Reservation was abrogated or diminished to exclude the Topanga Cession from its boundary; whether the Wendat Reservation was diminished to exclude the Topanga Cession from its boundary; or whether both reservations were diminished such that the Topanga Cession is not considered Indian Country under 18 U.S.C. § 1151.

2. Assuming the Topanga Cession is considered Indian Country, whether the doctrine of preemption or infringement prevents the State of New Dakota from levying its Transaction Privilege Tax on the Wendat Commercial Development Corporation.

STATEMENT OF THE CASE

Statement of the Proceedings

This case arises from a dispute between two federally recognized Indian tribes, the Maumee Indian Nation (hereinafter the Maumee Nation) and the Wendat Band of Huron Indians (hereinafter the Wendat Band). The tribes disagree on the legality of a state tax levied on a Wendat Band tribal corporation located in an area known as the Topanga Cession. Historically, both tribes have laid claim to the Topanga Cession.

This case involves two legal issues for the Court to review. The first issue is whether the Topanga Cession is located on Maumee Reservation land, Wendat Reservation land, or neither. The resolution of this issue requires the Court to consider whether the Treaty with the Wendat abrogated the earlier Treaty of Wauseon, which established the Maumee Reservation boundary. The Maumee Nation argues that the Treaty of Wauseon was not abrogated, thus preserving the Maumee Reservation's original boundary.

If the Treaty of Wauseon was not abrogated, the next step of the inquiry is to determine whether Congressional allotment diminished the Wendat Reservation or the Maumee Reservation. The Maumee Nation argues that Congress diminished the Wendat Reservation through the allotment act of 1892, but that Congress did not diminish the Maumee Reservation through the allotment act of 1908. In the alternative, the Maumee Nation argues that the allotment acts diminished both reservations, meaning the Topanga Cession does not fall within either tribe's reservation boundary. In that instance, the Topanga Cession would no longer be considered Indian Country.

The second issue for the Court to review relies on the assumption that the Topanga Cession is still considered Indian Country. The question is whether the doctrine of

preemption or infringement prohibits the State of New Dakota from imposing its Transaction Privilege Tax on a Wendat Band tribal corporation within the Topanga Cession. Here, the Maumee Nation argues that the Topanga Cession is considered Indian Country pursuant to 18 U.S.C. § 1151(a) because it is located within the boundary of the Maumee Reservation. As such, the doctrines of preemption and infringement do not preclude state taxation of any Wendat Band corporation operating in the Topanga Cession, because it would be considered a nonmember corporation.

On November 18, 2015, the Maumee Nation filed a complaint in federal district court seeking a Declaration that (1) the Topanga Cession is located within the Maumee Reservation, and (2) that the State of New Dakota's Transaction Privilege Tax validly applied to any Wendat Band commercial development in the Topanga Cession. In the alternative, the Maumee Nation asked for a Declaration that the Topanga Cession was not considered Indian country.

The district court ruled for the Maumee Nation on both issues. It found that the Maumee Reservation had not been abrogated or diminished, while the Wendat Reservation had been diminished. It further found that the doctrines of preemption and infringement did not preclude the State of New Dakota's tax on the Wendat Band commercial development in the Topanga Cession. Thus, the district court granted the Maumee Nation's requested Declaration that the Topanga Cession was within the boundary of the Maumee Reservation and that the Transaction Privilege Tax applied to the Wendat Band tribal corporation within that boundary.

The Wendat Band appealed, and the case was held for two years in anticipation of the U.S. Supreme Court's opinion in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). On

September 11, 2020, a divided Thirteenth Circuit reversed the lower court's decision. The Honorable Judge Lahoz-Gonzales concurred in part and dissented in part. The court found that the Maumee Nation's claim to the Topanga Cession had been abrogated, while the Wendat Reservation boundary remained intact. Moreover, it found that the State violated both the doctrines of preemption and infringement by levying a tax on the Wendat Band's commercial development in Indian country. The case was remanded to the district court with instructions to withdraw and reissue its Declaration consistent with the Thirteenth Circuit's opinion.

The Maumee Nation petitioned the U.S. Supreme Court for a writ of certiorari, which this Court granted on November 6, 2020.

Statement of the Facts

The Uncontested Facts of the Tribal Claims to the Topanga Cession

The Maumee Indian Nation and the Wendat Band of Huron Indians are culturally distinct, federally recognized tribes. Their traditional land claims are located in what is now the State of New Dakota. These land claims overlap in an area known as the Topanga Cession. Both the Maumee Nation and the Wendat Band have maintained the exclusive right to the Topanga Cession since approximately 1937.

The disputed Topanga Cession came about due to the treaties each tribe negotiated with the U.S. government. The Treaty of Wauseon established the Maumee Reservation in 1802. This treaty designated the Wapakoneta River as the Maumee Reservation's eastern boundary. The Wapakoneta River moved approximately three miles to the West in the 1830s. Subsequently, the Treaty with the Wendat established the Wendat Reservation in 1859. This treaty designated the Wapakoneta River as the Wendat Reservation's western boundary. The

roughly triangular area between the river's course in 1802 and its course in 1859 makes up the Topanga Cession, which is now located in Door Prairie County, New Dakota. Both parties have stipulated that their land dispute does not need to be resolved with reference to water law regarding the river's movement.

Both tribes' reservations were affected by allotment following the General Allotment Act of 1887. The U.S. government sold approximately 650,000 acres of Wendat Reservation land pursuant to the Wendat Band's allotment act in 1892; the Maumee nation's 1908 allotment act resulted in the sale of approximately 400,00 acres of Maumee Reservation land. The parties stipulate that most of the Topanga Cession was declared surplus land under one of the two allotment acts. Allotment reshaped the demographics of the Topanga Cession—census data indicates that 98.3% of the residents of the area in 1880 were American Indian or Native Alaskan, but that dropped to 17.9% of the residents in 2010. The majority of the Indians currently living in the Topanga Cession either rent their property or purchased it in fee from non-Indian or government owners.

The Uncontested Facts of the Current Dispute

The Wendat Band wholly owns the Wendat Commercial Development Corporation (hereinafter the WCDC), incorporated under § 17 of the Indian Reorganization Act. In December 2013, the Wendat Band purchased 1,400 acres in fee from non-Indian owners in the Topanga Cession. The WCDC plans to construct and manage a residential and commercial development on this parcel, which would include public housing units and a senior nursing care facility for tribal members, a tribal cultural center and museum, and a shopping complex. The Wendat Band anticipates that the tribal cultural center, museum, and a café serving traditional Wendat cuisine will attract non-Indian consumers to patronize the

development. The tribe estimates that the development will create up to 350 jobs and earn more than $80 million per year in gross sales. The Wendat Band would use the proceeds from sales to fund the public housing units and nursing care facility in the development.

In November 2015, representatives from the Maumee Nation addressed the Wendat Band Tribal Council to remind them of the Maumee Nation's claim to the Topanga Cession. The Maumee Nation expected the WCDC to comply with the New Dakota Transaction Privilege Tax Statute, codified at 4 N.D.C. § 212. This statute requires businesses with gross proceeds of sales or gross income of more than $5,000 from in-state transactions to obtain a Transaction Privilege License. Licensees must also pay a 3% Transaction Privilege Tax on their gross proceeds of sales or gross income. The State of New Dakota would remit the tax it collected from the WCDC to the Maumee Nation under § 212(5) because the WCDC is a nonmember tribal corporation operating on Maumee Reservation land. The Maumee Nation planned to use this tax remittance to fund tribal scholarships and invest in economic tribal development. The tribe projected that these extra funds would lead to an increase in the average income of its tribal members.

The Wendat Band and the WCDC replied that the Topanga Cession was within their own reservation. Furthermore, the tribe contended that the State of New Dakota could not legally apply its Transaction Privilege Tax in Indian Country. This dispute resulted in the lawsuit now before this Court.

SUMMARY OF ARGUMENT

The United States Constitution provides that treaties are the supreme Law of the Land. This case should be decided in accordance with that principle. Congress entered into a treaty with the Maumee Indian Nation and established a reservation for the tribe. A short while later Congress entered into a treaty to establish a reservation for the Wendat Band. However, because of the migration of a river, Congress included land held by the Maumee in the treaty for the Wendat Band. Congress did not explicitly acknowledge that the land treaty with the Maumee was to be abrogated, nor that there was an awareness of doing so. This Court has established, Congress' intention to undermine a treaty right will not be lightly assumed. Therefore, with no clear and explicit intent from Congress, the treaty with the Maumee could not have been abrogated.

Furthermore, this Court has established a strong precedent that, absent clear and explicit intent from Congress, reservation boundaries will remain intact. In the Maumee Allotment Act of 1908, Congress included a single phrase that has been included in the precedent as hallmark language for disestablishment. However, the rest of the Act and the legislative history behind the Act show that Congress did not, in fact, intend to diminish the Maumee tribe's reservation boundaries. Rather Congress aimed to sell the surplus land within the reservation to non-Indian settlers and pay the proceeds to the tribe. When Congress so clearly delineates an intent, this Court should not rule contrary to that intent because of one phrase out of the entire Act. Congress intent was to act as a trustee to the tribe, not diminish their reservation and this case should be decided accordingly.

Contrarily, when Congress clearly delineates an intent to diminish a reservation, this Court should honor that intent. The Wendat Allotment Act statements that have been held to

be evidence of diminishment, while avoiding phrases this Court has deemed hallmark disestablishment phrases. However, when read alongside the legislative history of the Act, Congress' intent to diminish the reservation could not be clearer. While *McGirt* cautioned against relying on legislative history to find diminishment, that is not the case here. Rather, Congress made their intent clear and ignoring the legislative history that supports that interpretation of the Act would be taking the plenary power over disestablishment away from Congress and putting it into the hands of the Court.

If this Court finds the Maumee reservation diminished, by virtue of reasoning it has to find the Wendat reservation also diminished. In that instance, the Topanga Cession is non-Indian land.

The second issue is whether the State of New Dakota may require the WCDC to pay a Transaction Privilege Tax on the gross income of its commercial development in the Topanga Cession. The Wendat Band contends that the doctrines of Indian preemption and infringement prevent the state from levying this tax in Indian country. However, the Court should find for the Maumee Nation on this issue because neither doctrine precludes the tax at issue here.

The doctrine of infringement prevents state governments from interfering with a tribe's sovereign right to govern its own affairs. The corresponding doctrine of Indian preemption is based on federal supremacy over state law and a general presumption in favor of tribal autonomy. Indian preemption prohibits states from exercising authority in areas of preexisting and expansive federal or tribal authority.

Traditionally, the Court has held that a tribe has authority over its own members on the tribe's reservation. However, it has carved out exceptions to the doctrines of infringement

and preemption for state authority over Indian affairs that do not fit the tribal nation/reservation land paradigm. State taxation in Indian country has been allowed in some circumstances; namely, a state may impose a nondiscriminatory gross sales or gross income tax on a nonmember tribal entity on another tribe's reservation.

The instant case falls within an area where the state can tax a tribal entity without violating the doctrines of infringement or preemption. As argued previously, the Topanga Cession is within the Maumee Reservation. Therefore, the Wendat Band and any Wendat tribal corporation would be considered a nonmember Indian tribe in the Topanga Cession. Case law supports the proposition that nonmember Indians are treated the same as non-Indians for purposes of a statewide transaction privilege tax on income generated by sales to non-Indians. The prevailing test for the preemption doctrine, the *Bracker* test, also supports the State's authority to tax the WCDC. Therefore, the State of New Dakota may require the WCDC to pay its Transaction Privilege Tax in the Topanga Cession.

ARGUMENT

I. THE TOPANGA CESSION IS WITHIN THE MAUMEE RESERVATION BECAUSE CONGRESS DID NOT ABROGATE OR DIMINISH THE RESERVATION BOUNDARY

The first issue is whether the Topanga Cession is considered Indian Country under 18 U.S.C. § 1151. To resolve this question, it is necessary to determine whether the Treaty with the Wendat abrogated the Treaty of Wauseon such that the Topanga Cession was no longer Maumee Reservation land as of 1859. If the Treaty of Wauseon was not abrogated, it is further necessary to resolve whether the Wendat Reservation or the Maumee Reservation was diminished by the Allotment Acts of 1892 and 1908, respectively. If it is found that only one reservation was diminished, then the Topanga Cession remained Indian Country as part of the undiminished reservation. In the alternative, both reservations may have been diminished, rendering the Topanga Cession outside of Indian Country completely.

The resolution of these corresponding issues becomes clear upon examination of the text and legislative history of the apposite treaties and allotment acts. This Court's interpretation of such documents in similar cases supports the same conclusion. Namely, the Treaty with the Wendat did not abrogate the Treaty of Wauseon; subsequently, the Wendat Reservation was diminished while the Maumee Reservation remained intact. Therefore, this Court should find that the Topanga Cession is considered Indian Country within the Maumee Reservation pursuant to 18 U.S.C. § 1151(a).

A. Congress Has the Power to Make Treaties and Establish Reservations as well as Abrogate Treaties and Diminish or Disestablish Reservations

"Congress possesses plenary power over Indian affairs." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Early case law established that this power extended to

treaty making with Indian tribes[1]. The federal government used this treaty making power to create reservations of land for the Indian tribes, in order to reduce conflict with white settlers. These treaties are responsible for many tribes' rights today and are thus, the frequent topic of legislation. These treaties are the "supreme Law of the Land." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (quoting U.S. Constitution art. VI, cl. 2).

Along with Congress' power to make treaties that created these reservations came Congress' power to diminish or disestablish the reservations. This right to diminish or disestablish is Congress' exclusively. See *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (explaining the *Lone Wolf* Court "decided that Congress could diminish reservations unilaterally"). Congress must have clearly intended for the diminishment or disestablishment of a reservation in order for diminishment or disestablishment to be found. *United States v. Dion*, 476 U.S. 734, 738 (1986). There is 'an enduring principle of Indian law … [that] courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 790 (2014). This Court has been careful to recognize Congress' intent when passing these Acts is the decision maker, not any work of the Court. *McGirt v. Oklahoma*, 140 S. Ct. at 2462.

B. The U.S. and the Maumee Nation Established a Reservation by Treaty in 1802

The Treaty of Wauseon, signed in 1801 and ratified by Congress in 1802, established a reservation for the Maumee tribe. The treaty established and guaranteed the tribe's rights within the established boundaries. The reservation boundaries were established as being between "the western bank of the river Wapakoneta, between Fort Crosby to the North and the Oyate Territory to the South and run westward from there to the Sylvania river." Article

[1] Holden v. Joy, 84 U.S. (17 Wall.) 211, 242 (1872); United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 192 (1876); Dick v. United States, 208 U.S. 340, 355–56 (1908).

III, Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. Congress further elaborated that, "[t]he United States allot all the lands contained within the said lines to the Maumee, to live and to hunt on, and to such of the Maumee Nation as now live thereon" Article II, Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. While the treaty did not expressly use the term "reservation" this Court has found language similar to the language used in The Treaty of Wauseon to establish a reservation. See *McGirt v. Oklahoma*, 140 S. Ct. at 2460. (holding fixed boarders for a 'permanent home to the whole Creek nation of Indians' established a reservation); see also *Menominee Tribe v. United States*, 391 U.S. 404, 405 (1968).

C. The U.S. and the Wendat Band Established a Reservation by Treaty in 1859

The Treaty with the Wendat created a reservation for the Wendat Band in 1859. The treaty outlined the boundaries of the Wendat Band's reservation as "lands East of the Wapakoneta River; with the Oyate Territory forming the southern border and the Zion tributary forming the northern born. The eastern terminus of these reserved lands is the line bordering the New Dakota Territory and the Oyate Territory." Article I, Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. Congress specified these lands were 'reserved' for the tribe, and thus, a reservation was established. *Id*.

D. The Treaty with the Wendat did not abrogate the Treaty of Wauseon

Treaties between the U.S. government and Indian tribes have been continually upheld as a powerful and lasting tool to protect tribal sovereignty. Infringement upon treaty rights is examined with great scrutiny and only with "clear and explicit' intent from Congress to abrogate those rights, will a court uphold a change in the rights outlined in a treaty. *United States v. Dion* 476 U.S. at 738. Here, the Wendat Band argues that by creating a reservation boundary for the Wendat band that includes land within the reservation boundary for the

Maumee Nation in the Treaty of Wauseon, Congress has abrogated the Maumee Nation's treaty and the land became part of the Wendat Reservation. In *Lone Wolf v. Hitchcock*, the Supreme Court said Congress has the power to unilaterally abrogate treaties made with Indian tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

However, this Court's precedent has clearly established that treaty rights are only found to be abrogated when Congress' intent to do so is 'clear and explicit.' This Court has previously established that essential to finding Congressional intent to abrogate a treaty right, is 'clear evidence that Congress actually considered the conflict between its intended action on one hand and … treaty right on the other, and chose to resolve that conflict by abrogating the treaty.' *United States v. Dion*, 476 U.S. at 740. The language of the Treaty with the Wendat does not in any way indicate an intent to cede Maumee Reservation land to the Wendat band. Neither the legislative history or the language in the treaty show that Congress was aware of the treaty abrogating The Treaty of Wauseon.

Rather, the treaty makes no mention at all of the Maumee Reservation. There is no evidence that Congress was even aware they were creating overlapping reservation boundaries when they enacted the Treaty with the Wendat. Clear and explicit intent can, in no way, be established from language that fails to mention the land in issue at all. Rather, what occurred was a congressional oversight of the river's migration. An error or omission of consideration is not evidence of intent. See *United States v. Dion*, 476 U.S. at 740. Unable to point to operative language in the Treaty with the Wendat or legislative history surrounding the treaty's passage that points to Congress' intent to cede the Maumee reservation land to the Wendat, the Court cannot find that Treaty with the Wendat to have abrogated the Treaty of the Wauseon's establishment of reservation boundaries for the Maumee.

E. The Maumee Allotment Act of 1908 Did Not Diminish the Maumee Reservation Because the Act as a Whole Does Not Convey a Clear Intent by Congress to Diminish Reservation Boundaries

Reservation boundaries may only be diminished by Congress. *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016). Congress must clearly express intent for the diminishment of the reservation in order for the diminishment to be valid. *Id*. at 1079. Thus, the Acts of Congress are determinative in establishing whether a tribe's reservation has been diminished. *McGirt v. Oklahoma*, 140 S. Ct. at 2462. The Allotment Acts in the end of the nineteenth century encouraged tribes to move away from communal reservations and onto private allotments of land. After the reservation land was broken up into these allotments, the leftover or "surplus" land not allotted to tribal members was the focus of the U.S. government. The government sought to encourage white settlers onto the surplus lands in an attempt to 'civilize' the Indians and disestablish the tribe's communal lifestyle on reservations. The government assumed the extinguishment of reservations was inevitable, regardless of whether the Allotment Acts diminished or disestablished them. Thus, the Allotment Acts have been the center of legislation because of the ambiguous language Congress used when relaying whether a reservation was diminished or not.

The operative language of the Act must clearly and explicitly convey Congress' internet to diminish the boundaries of the reservation. *Id.* at 2463. While the particular words Congress chooses to use to convey the diminishment are not determinative, the intent must clearly reference to cession or other language to evidence the present and total surrender of all tribal interests. *Hagen v. Utah*, 510 U.S. 399, 411-12 (1994). When the language of an

Act is vague or does not reach the level to be considered clear and explicit, the Courts have looked to the negotiations leading up to the Act and the negotiations during the passing of the Act. *McGirt v. Oklahoma*, 140 S. Ct. at 2469. This legislative history can be used to inform hoe to interpret the language Congress used when the Act was written, whether that was diminishment, disestablishment, or otherwise. *Id*. Only when Congress' intent clearly indicates a diminishment in reservation boundaries, will diminishment be found. *Id*. at 2463.

Here, the Wendat Band argues that the Maumee Allotment Act of 1908 is the Act of Congress that diminished the Maumee reservation boundaries. Specifically, the language in Section 1 of the Act states, "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." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). While it is true that the eastern quarter being "returned to the public domain" is language that would suggest diminishment, this language is not persuasive enough to show a clear intent for diminishment from Congress. Rather, when the language of the act and the legislative history of the act are looked at as a whole, the intent of Congress is not to diminish the reservation but merely to act as a trustee to sell the lands for the tribe.

In *Seymour*, the Court held that language that specifies the 'proceeds from the disposition of lands affected by its provisions shall be 'deposited in the Treasury of the United States to the credit of the . . . Indians' is indicative of the Federal Government acting as a guardian and trustee for the Indians and not indicative of an Act that would diminish reservation boundaries. *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 427 (1962). In *Solem*, the court held that when the Act instructed the Geological Survey to examine the opened area for 'lands bearing coal" and exempted those sections from

allotment or disposable, the apparent purpose was to reserve the mineral resources for the whole tribe. *Solem v. Bartlett*, 465 U.S. at 474. The language in the Maumee Allotment Act of 1908 also contains the provisions in *Seymour* and *Solem* that this Court relied on in their decision that Congress did not intend to diminish or disestablish reservation boundaries. This precedent serves as strong evidence that Congress' intent was to preserve the reservation and the tribe's rights to the reservation land.

This Court has previously held language that focused on allowing portions of the reservation land to be bought and settled on "did no more than to open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Solem v. Bartlett*, 465 U.S. at 473. Here, the Maumee Allotment Act of 1908 explicitly stated this was the goal of the act and that "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." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). Congress clearly and explicitly stated the intent of the Act, that intent having nothing to do with reservation boundary diminishment.

Additionally, Solem elaborated that phrases that are usually indicative of diminishment, in this case 'returning to the public domain,' are not dispositive. *Id*. This Court held that isolated phrases indicative of diminishment cannot satisfy the burden of 'clear intent' from Congress needed to find reservation diminishment. *Id*. Rather, this Court relied on the legislative debate of the Act. Specifically, it examined how the Act

> centered on how much money the Indians would be paid for certain sections of the opened area that the United States was going to buy for school lands, and no mention was made of the Act's effect on the reservation's boundaries or

> whether State or Federal officials would have jurisdiction over the opened areas.

See 42 Cong. Rec. 4753-55 (1908) (Senate debate); 42 Cong. Rec. 7003-07 (1908) (House debate). Equally, the legislative history of the Allotment Act involving the Maumee tribe similarly focused on providing "$5.05 an acre to the Indians on account of sections 16 and 36, granted to the State of New Dakota for school purposes." 42 Cong. Rec. 2345-2349 (May 29, 1908) (House debate). In fact, one discussion in the legislative history expressly clarified, "that all lands unsold will continue to belong to the Indians . . . [u]ntil there is payment the land belongs to the Maumee." *Id*.

In contrast in *DeCoteau*, the Court emphasized what type of language would satisfy the high standard that is clear and explicit intent from Congress. *DeCoteau v. Dist. County Court for Tenth Judicial Dist.,* 420 U.S. 425, 448 (1975). In *DeCoteau*, the court held that language of cession, accompanied by an unconditional commitment from Congress to compensate the tribe for their open land, is enough to presume Congress intended the tribe's reservation to be diminished. *Id.* Additionally, the court emphasized cession, with language that evokes the present and total surrender of tribal interests is clear and explicit intent to diminish or disestablish a reservation boundary. *Id*. Here however, the word "cede" is used a singular time in the Act. The Act does not contain language that expresses the tribe surrendering their tribal interests. Thus, without the operative language of the Act alone reaching the standard of clear and explicit intent from Congress, the legislative history of the Act becomes even more persuasive in understanding the Act, as Congress intended at that time it was passed.

The legislative history categorizes the Act as 'an Act to authorize the allotment, sale and disposition of the easter quarter of the Maumee Indian Reservation.' This language is similar to the language of the Cheyenne River Act at issue in *Solem*. *Solem v. Bartlett*, 465 U.S. at

473. In *Solem*, the court held that that the Acts language to "sell and dispose" certain lands was markedly different from the language to "cede, sell, relinquish and convey" the land as seen in cases where diminishment was found. *Id*. This difference emphasized that while the latter represented a clear intent from congress to diminish reservation boundaries, the former did not. *Id*. Therefore, the language of "sell and dispose" did not evince a clear and express intent from Congress to diminish reservation boundaries.

Furthermore, the Allotment Act merely states that the "eastern quarter" of the reservation be considered surplus. Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). The Act does not delineate where the eastern quarter begins or ends or what directional boundaries will be used to section off the land from the reservation. In contrast, the acts where Congress have found diminishment such as in *Rosebud Sioux Tribe v. Kneip* and *Hagen v. Utah* contain operative language describing how the reservation boundary has been changed. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Hagen v. Utah*, 510 U.S. 399 (1994).

In the face of ambiguities, the treaty should be construed in favor of tribal rights. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). This Court has repeatedly reinforced that 'the general rule that '(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973). The Bureau of Indian Affairs has lost the records specifying which parcels of land the Maumee tribe was compensated for. Without clear records to establish boundary lines, and without express language from Congress having done so, the ambiguity in reservation boundary must be

resolved in favor of the tribe. Here, that would be finding the reservation to be intact with the original boundaries laid out in the 1801 Treaty with the Wauseon.

F. The Wendat Allotment Act Diminished the Wendat Reservation

The Wendat Allotment Act diminished the boundaries of the Wendat Reservation clearly and explicitly. The operative language of the Act, when read alongside the legislative history of the Act, make it clear that Congress' intent was to disestablish the reservation. The Act declares that the government will pay a sum certain of 'two-million and two-hundred thousand dollars in total and complete compensation' for the reservation land. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). In addition, the Act provides that the lands be 'open to settlement.' *Id*. This language coupled with the legislative history provides a clear record that Congress' goal was to disestablish the Wendat Reservation through The Wendat Allotment Act.

Congress, when voting on the Act, provided that "by the opening of this reservation more than 2,000,000 acres of valuable land will be added to the public domain." 23 Cong. Rec. 1777-80 (Jan. 14, 1892) (House debate).The legislative history emphasized that members of the Wendat tribe would lose their 'rations, annuities, and tribal negotiations … when the Indian has become a citizen." *Id*. This language illustrates Congress' belief that with this Act, the tribe was relinquishing all of their rights as a tribe. In addition, the record shows Congress spoke about the 'good work of reducing the larger reservations, and the cession of the remaining lands to the United States." *Id*. Read as a whole, the legislative history emphasizes the importance of disestablishment of reservations and stripping tribes of their rights in favor of assimilating them to live like the white settlers in the area.

McGirt established that extratextual sources may not establish diminishment where the allotment act's language does not contain language of diminishment. *McGirt v. Oklahoma*, 140 S. Ct. at 2470. However, in this case the allotment act contains language that shows a clear intent for diminishment. The legislative history surrounding the act only serves as further evidence that Congress' intent was unequivocally to diminish the Wendat Band's reservation. Evidence of Congress' intent to diminish the reservation does not rely solely on the legislative history. Rather the legislative history merely reinforces the notions of diminishment found in the operative language of the Act.

Therefore, this Court may find disestablishment without ruling in conflict with the decision in *McGirt* by merely using the legislative history as a tool, to reveal "a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation . . . that Congress shared the understanding that its action would diminish the reservation." *Solem v. Bartlett* 465 U.S. at 471.When Congress makes its intent clear and includes language in the Act that supports this intent, this Court should uphold that intent. Finding otherwise would undermine the plenary power Congress has over these issues and give the Court the power to make determinations on issues that have been reserved for Congress.

G. The Topanga Cession is Outside of Indian Country if the Maumee Reservation Boundaries are Diminished

The Maumee Nation's alternative argument is that both reservations were diminished following the allotment acts. The diminished reservations' borders exclude the Topanga

Cession from Maumee Nation and Wendat Band land. Therefore, the Topanga Cession is not in Indian country at all.

As stated previously, Congress may unilaterally abrogate treaties made with tribal nations. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). However, an act must display clear congressional intent to abrogate treaty rights. *See, e.g.*, *DeCoteau v. District Court*, 420 U.S. 425, 444 (1975); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 359 (1962). A court may examine the text and legislative history of an act to determine congressional intent. *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). The court's examination must show that there is "clear evidence 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. at 740.

The definition of Indian country is codified in 18 U.S.C. § 1151. Subsection (a) designates as Indian country "all land within the limits of any Indian reservation under the jurisdiction of the United States government." Subsections (b) and (c) add to this definition all "dependent Indian communities" and "Indian allotments, the Indian titles to which have not been extinguished."

Here, there is clear evidence of Congress' consideration of the Maumee Nation and the Wendat Band's treaty rights. There is also clear evidence of Congress' intent to abrogate both tribes' treaty rights by diminishing the boundaries of the tribes' reservations. The Maumee Allotment Act states, "The Indians have agreed to . . . cede their interest in the surplus lands to the United States where it may be returned the public domain." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). And the Wendat Allotment Act states, that the government will pay a sum certain of 'two-million and two-hundred thousand dollars

in total and complete compensation' for the reservation land. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). In conclusion, the Topanga Cession does not fall within the Maumee and Wendat reservations' diminished borders. Because it is not "land within the limits of any Indian reservation," it is not considered Indian Country under 18 U.S.C. § 1151(a).

Neither is the Topanga Cession considered Indian country under 18 U.S.C. § 1151(b) or (c). This Court has never interpreted the term "dependent Indian community" in § 1151(b), and its definition remains unclear in lower courts as well. Paul W. Shagen, *Indian Country: The Dependent Indian Community Concept and Tribal/Tribal Member Immunity from State Taxation*, 27 N.M.L.R. 421, 422, 427 (1997). Federal circuit courts have used several different tests to determine whether a dependent Indian community exists in a given case, but for the purposes of this argument, it is sufficient to note that "the federal government [must] either own or have 'set apart' the land in question," and therefore, "the dependent Indian community concept may be of limited significance because it largely parallels the reservation concept." *Id.* at 427.

Here, the Topanga Cession is not a dependent Indian community for the same reason it is not reservation land. Both parties stipulate that the majority of the land in the Topanga Cession was declared surplus due to the allotment acts, and subsequent homesteading in the area largely replaced the Indian population. Once the reservations' boundaries were diminished, the U.S. did not retain in trust or otherwise set aside land in the Topanga Cession on behalf of either tribe. Most of the area is owned in fee simple by individual citizens, the State government, or the U.S. government. The Topanga Cession is therefore not Indian country under § 1151(b). Furthermore, § 1151(c) does not apply because both parties stipulate that virtually no Indians selected allotments in the Topanga Cession. As a result, the

Topanga Cession falls outside any definition in § 1151 and should not be considered Indian country.

II. THE STATE OF NEW DAKOTA MAY LEVY A TRANSACTION PRIVILEGE TAX ON THE WENDAT BAND CORPORATION IN THE TOPANGA CESSION

The second issue is whether the State of New Dakota's Transaction Privilege Tax is prevented by the doctrine of Indian preemption or infringement. For the purposes of this argument, it is assumed that the Topanga Cession is in Indian country. However, New Dakota is not prohibited from levying a tax in the Topanga Cession merely because it is Indian Country. The doctrines of Indian preemption and infringement only preclude state taxation in certain circumstances, depending on the identity of the taxpayer and their relationship to the Indian country in which they are taxed. The Maumee Nation argues that the Topanga Cession is within the Maumee Reservation border; thus, the Wendat Commercial Development Corporation is a nonmember entity on the reservation. A state may exercise certain areas of civil regulatory jurisdiction over nonmembers on an Indian reservation. As will be shown, the instant case is one area in which the state can tax a nonmember business entity on reservation land. New Dakota may require the Wendat Commercial Development Corporation to pay the Transaction Privilege Tax.

The doctrines of Indian preemption and infringement are closely related, but either one is sufficient to invalidate a state action. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The doctrine of infringement arises from the sovereign powers guaranteed to tribal nations through treaties with the U.S. government. This Court first prevented state interference with tribal sovereignty in *Worcester v. Georgia*, 31 U.S. 515 (1832). Since then, the doctrine of infringement has been narrowed to allow for some state

intrusion into tribal jurisdiction. *See generally McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 168-72 (1973) (discussing the evolution of the Indian sovereignty doctrine and how it has limited state jurisdiction). The Court has developed some exceptions to this doctrine for cases in which "essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Williams v. Lee*, 358 U.S. 217, 219 (1959). Yet the essential premise of the infringement doctrine remains the same: it protects "the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220; *see also Fisher v. District Court*, 424 U.S. 382, 386 (1976). Otherwise, state governments may not infringe upon tribal jurisdiction unless Congress specifically authorizes the state's action or abrogates the tribe's treaty rights. *Williams*, 358 U.S. at 220-21.

The doctrine of Indian preemption, like infringement, serves to protect tribal sovereignty. It also affirms federal supremacy over state governments.[2] Indian preemption precludes state governments from asserting jurisdiction over certain tribal affairs that are already regulated by the tribe itself or by Congress.[3] This doctrine is exemplified in *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965). There, the Court struck down an Arizona state tax applied to a trading post on the Navajo reservation, stating that the U.S. government's "all-inclusive regulations and the statutes authorizing them…show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Id.* at 690.

[2] Federal law takes precedence over state law under the Supremacy Clause. U.S. CONST. art. VI, § 2.
[3] The federal government's power to regulate Indian affairs arises from the Commerce Clause. U.S. CONST. art. 1, § 8, cl. 3.

However, it is important to note that the Indian preemption doctrine differs from preemption analysis in other fields of law. *See Bracker*, 448 U.S. at 143; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983). For one, tribal sovereignty "provides a backdrop against which the applicable treaties and federal statutes must be read" when analyzing an Indian preemption issue. *McClanahan*, 411 U.S. at 172. Any textual ambiguity in such treaties and statutes will be construed in favor of tribal autonomy. *E.g. Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177 (1989); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *McClanahan,* 411 U.S. at 174. Indian preemption also differs from traditional preemption because the Court has begun to use a balancing test articulated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 145. This test involves "a particularized inquiry into the nature of the state, federal, and tribal interests at stake…to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.*

The Court has considered several factors when it exercises this balancing test in matters of state taxation. First, preemption of a state tax can be found when there is a "detailed," "pervasive," and "comprehensive" set of federal regulations governing a given field. *Id.* at 147, 148. Furthermore, the absence of Congressional intent to preempt state regulation does not, in itself, justify state intrusion into this federal scheme. *Ramah Navajo Sch. Bd. Inc. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982).

The Court weighs the comprehensive federal scheme against a state's "legitimate regulatory interest" in the field. *Bracker*, 448 U.S. at 150. The legitimacy of the state interest is strengthened if the state can show that its tax is used to compensate for governmental services from which the taxpayer benefits. *See Id.* at 148-50; *see also Ramah*, 458 U.S. at

843-44. The state's interest is strongest when it taxes "off-reservation value" and when the legal incidence of the tax falls on "the recipient of state services." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980). A state's "generalized interest in raising revenue" is not sufficient justification for intruding into federal authority. *Bracker*, 448 U.S. at 150.

Second, preemption of a state tax can be found when it frustrates the federal government's policy of strengthening tribal autonomy and economic self-sufficiency. *Id.* at 149; *but see Cotton Petroleum Corp.*, 490 U.S. at 177 (upholding a state severance tax on a non-Indian oil and gas extractor operating on reservation land, despite concurrent tribal severance tax);[4] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157-58 (1973) (holding that tribal tax exemption in the IRA did not confer tribal immunity from a nondiscriminatory gross receipts tax on tribal corporation operating on off-reservation land). The federal government's policies regarding tribal sovereignty are reflected in several acts regarding Indian affairs, such as the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 et seq. (1975); the Indian Financing Act, 25 U.S.C. § 1451 et seq. (1974), and the Indian Reorganization Act, 25 U.S.C. § 5101 et seq. (1934).

Third, preemption of a state tax can be found when it burdens a tribe's treaty rights. *See Wash. State Dep't of Licensing v. Cougar Den, Inc.,* 139 S. Ct. 1000, 1011 (2019); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 337-38.

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[4] Congress stated that one of the purposes of the Indian Mineral Leasing Act of 1938 was to guarantee to Indian tribes "the greatest return from their property" when the tribes engaged in mineral extraction. H.R. Rep. No. 75-1872, at 2 (1938). The Court in *Cotton Petroleum* rejected the "talismanic effect" of this purpose and instead found "no evidence…that Congress intended to remove all barriers to [tribal] profit maximization." 490 U.S. at 180.

The Court has upheld state regulation in some areas of taxation. One such area is state taxation of cigarettes. Thus, states may tax the sale of cigarettes to non-Indian buyers on reservation land, and they may impose a minimal burden on Indian sellers in order to collect the tax. *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976). The Court extended this principle in *Washington v. Confederated Tribes of Colville Indian Reservation* when it upheld a state tax on the sale of cigarettes to nonmember Indians on reservation land. 447 U.S. at 161; *see also Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991).

Liquor regulation is another area of expanded state jurisdiction. The Court did not find the doctrine of infringement or Indian preemption precluded the state of California from imposing its liquor licensing regulations on a federally licensed Indian trader on tribal land. *Rice v. Rehner*, 463 U.S. 713, 725, 734 (1983).[5] Based on this ruling, lower courts have upheld further allowances of state liquor regulation. *See, e.g.*, *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 719 (8th Cir. 1986) (upholding the State of Washington's authority to tax and control tribal liquor sales to nonmember Indians and non-Indians on reservation land); *Citizen Band Potawatomi Indian Tribe v. Okla. Tax Comm'n*, 975 F.2d 1459, 1462-63 (10th Cir. 1992) (affirming state and tribal concurrent jurisdiction and allowing state to require liquor license for tribal sales of 3.2 beer).

The broadening of state jurisdiction is not limited to cigarette and liquor regulation. This Court has upheld state taxation in Indian country for several other circumstances in

[5] The Court's reasoning in *Rice* focuses on the validity of state regulation in the context of liquor sales between the federally licensed Indian trader and tribal members on reservation land: "To the extent that Rehner [the licensed Indian trader] seeks to sell to non-Indians, or to Indians who are not members of the tribe with jurisdiction over the reservation on which the sale occurred, the decisions of this Court have already foreclosed Rehner's argument that the licensing requirements infringe upon tribal sovereignty." 463 U.S. at 720.

other areas of taxation. *See, e.g.*, *Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 34 (1999) (upholding a state tax on the proceeds of a contract between the federal government and a nonmember Indian private contractor on reservation land); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157-58 (1973) (upholding a state's nondiscriminatory gross receipts tax on a tribally-owned ski resort on off-reservation land); *see also Cotton Petroleum Corp.* 490 at 177; *but see Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 165-66 (1980) (holding that federal regulation of Indian trading preempted a state's Transaction Privilege Tax on the sale of farm equipment by a non-Indian business to a tribe on the tribe's reservation).

The doctrines of Indian preemption and infringement, with their myriad exceptions and competing sovereign interests, are difficult to assess in any case. However, the application of this law to the facts of the present case shows that neither doctrine shields the WCDC from paying New Dakota's Transaction Privilege Tax.

A. The Doctrine of Infringement Does Not Preclude State Taxation of a Nonmember Tribal Corporation on the Maumee Reservation

The doctrine of infringement would invalidate New Dakota's Transaction Privilege Tax if it interfered with a tribe's sovereignty over its own members. *See Williams*, 358 U.S. at 220. This Court held in *Montana v. Blackfeet Tribe of Indians* that "Indian tribes and individuals generally are exempt from state taxation *within their own territory.*" 471 U.S. 759, 764 (1985) (emphasis added). Here, the Maumee Nation argues that the Topanga Cession is within the boundary of the Maumee Reservation. The doctrine of infringement would therefore be implicated if the State of New Dakota infringed upon Maumee tribal sovereignty on Maumee Reservation land. That is not the case. The Wendat Band and its

corporate entity, the WCDC, are considered nonmember Indians within the Topanga Cession. This Court has held on several occasions that a state does not infringe on a tribe's sovereignty by collecting a tax from a nonmember Indians on an Indian reservation.

The most salient decision regarding the infringement doctrine is found in *Washington v. Confederated Tribes of Colville Indian Reservation*, which affirmed Washington State's authority to tax nonmember Indians on Indian land for cigarette sales. 447 U.S. at 161. The Colville, Lummi, Mekah, and Yakima tribes brought suit against the State to enjoin a state excise tax and a sales tax on cigarette sales to nonmembers on reservation land. *Id.* at 139-45. The tribes argued that they had in place tribal regulations governing cigarette sales on their reservation, and they already levied their own taxes on cigarette sales. The tribes contended that a concurrent state tax would infringe upon their tribal sovereignty. *Id.* at 154-155. However, the Court did not find infringement, regardless of whether the state tax would deprive the tribe of revenue or "significantly touch[] the political and economic interests of the Tribes." *Id.* at 156-58. The state tax was valid because there was "no direct conflict" between state and tribal authority when the state taxed nonmembers and non-Indians on the tribes' reservation land. *Id.* at 158.

In the instant case, there is also "no direct conflict" between state and tribal authority. The Maumee Nation does not impose a tribal transaction privilege tax on businesses operating in the Topanga Cession. Neither would the Maumee Nation be economically burdened by the taxation scheme; in fact, it will benefit from the transaction privilege tax. This is because 4 N.D.C. § 212(5) provides that New Dakota will remit to each tribe the proceeds of the tax collected on the tribe's reservation land. Thus, no legal or economic burden from the Transaction Privilege Tax would fall on the Maumee Nation. The mere

administrative act of collecting the tax on tribal land and remitting it to tribes does not infringe on a tribe's authority to collect its own taxes. The purpose of the state's tax collection is not to supersede tribal authority, but rather to centralize and streamline the enforcement of the tax for the benefit of the tribe. 4 N.D.C. § 212(5). Furthermore, nothing in 4 N.D.C. § 212 attempts to preclude tribes from levying additional tribal taxes on their reservations.

The only conflict between tribal sovereignty and the State of New Dakota's Transaction Privilege Tax appears in 4 N.D.C. § 212(4). That subsection waives the licensing and taxation requirement for a tribe or tribal business "operating within its own reservation on land held in trust by the United States." The Court has invalidated distinctions in state taxation jurisdiction between land held in trust and land held in fee or otherwise within the border of a reservation. *E.g. Bryan v. Itasca County* 426 U.S. 373, 390-91 (1976); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. at 479. However, this distinction is irrelevant as it applies to the matter at issue. The tax does not fall on the Maumee Nation within the Maumee Reservation, whether on trust or fee land. Instead, it falls on the nonmember WCDC.

B. The Doctrine of Indian Preemption Does Not Preclude State Taxation of a Nonmember Tribal Corporation on the Maumee Reservation

Neither federal nor tribal authority preempts the State of New Dakota from applying its Transaction Privilege Tax to nonmembers on the Maumee Reservation. First, the state tax does not implicate any relevant treaty rights that might preempt taxation. Further, the state's interest in this area of taxation outweighs the federal and tribal interests because it does not disturb federal policy regarding the encouragement of tribal economic enterprise, nor does it

intrude upon tribal regulatory action. Therefore, this Court should uphold the Transaction Privilege Tax on nonmembers in the Topanga Cession.

There are no Wendat Band treaty rights that preempt the state tax, even if the Topanga Cession is located within the Wendat Reservation. The Treaty with the Wendat in 1859 established the Wendat Reservation's borders after the tribe "cede[d] to the United States their title and interest to lands in the New Dakota Territory, excepting those lands East of the Wapakoneta River." Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. Within the borders of the Wendat Reservation, the Wendat Band retained its "title and interest" to the land, but no other language in the treaty protects or affords additional rights. Compared to the rights guaranteed in other treaty agreements, the Treaty with the Wendat provides no support for the preemption doctrine to be applied here. *See Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1007 (2019) (detailing the treaty rights contained in the Treaty Between the United States and the Yakama Nation of Indians of 1855).

The state's "legitimate regulatory interest" exceeds the consideration of all other federal and tribal authority as well. This conclusion becomes clear upon a comparison of the instant case with preemption cases this Court has decided in the past. Two cases in particular help resolve this issue in favor of the Maumee Nation. The first is *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). That case involved Sierra Blanca Ski Enterprises, a corporation owned by the Mescalero Apache Tribe that operated a ski resort on off-reservation land it leased from the federal government. *Id.* at 146. The tribe brought suit after it paid under protest a state tax on the ski resort's gross receipts of sale. *Id.* After examining the Mescalero Apache Tribe's treaty rights, federal law, and New Mexico legislation regarding its admission as a state, the Court held:

> Here, the rights and land were acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by §§ 476 and 477 of the [Indian Reorganization] Act. These provisions were designed to encourage tribal enterprises 'to enter the white world on a footing of equal competition.' 78 Cong. Rec. 11732. In this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to. We therefore hold that the exemption in § 465 does not encompass or bar the collection of New Mexico's nondiscriminatory gross receipts tax and that the Tribe's ski resort is subject to that tax.[6]

Id. at 157. Like the tax in *Mescalero*, the State of New Dakota's transaction privilege tax is a nondiscriminatory tax on gross receipts from "businesses throughout the State." The Wendat Band, like the Mescalero Apache Tribe, cannot claim "expansive immunity from ordinary income taxes" merely due to its tribal status or its exemption from other state taxes. The WCDC commercial development is outside of the Wendat Band's reservation, and therefore, it should be subject to the same income tax as other nonmember businesses.

The second comparable case is *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). In *Cotton Petroleum*, the Court upheld New Mexico's tax on the value of a non-Indian mineral extraction corporation's oil and gas production. *Id.* at 173. The corporation operated entirely on the Jicarilla Indian Reservation, and it paid oil and gas severance and privilege taxes to the Jicarilla Tribe in addition to the New Mexico State tax. *Id.* at 168-69.

The Court distinguished the tax in *Cotton Petroleum* from the results of the Indian preemption balancing test applied in *Bracker* and *Ramah*. *Id.* at 185. It noted,

[6] The tax exemption to which the Court refers is now located at 25 U.S.C. § 5108. It states that "any lands or rights acquired pursuant to th[e Indian Reorganization Act]…shall be exempt from State and local taxation." The Mescalero Apache Tribe argued that the lease to its ski resort land was acquired pursuant to the IRA, and therefore, the ski resort was exempt from all state taxation, not just exempt from state land taxes. *Mescalero Apache Tribe*, 411 U.S. at 156-57.

"this is not a case in which the State has had nothing to do with the on-reservation activity, save tax it. Nor is this a case in which [the State]…imposed a substantial burden on the Tribe." *Id.* at 186. The balancing test in *Cotton Petroleum* weighed in favor of state taxation based on several factors. The non-Indian corporation taxpayer benefitted from state services that were funded by the state's taxes. *Id.* at 185-86. Furthermore, the Court found that the state's tax on Cotton Petroleum corporation did not impose an economic burden on the Jicarilla Tribe, nor did the tax have "an adverse affect on the Tribe's ability to attract oil and gas lessees." *Id.* at 185-86, 191.

The instant case is distinguishable from the preemption arguments in *Bracker* and *Ramah* for similar reasons. First, the nonmember corporation taxpayer will benefit from state services that are funded by New Dakota's Transaction Privilege Tax. New Dakota's purpose for the tax is to create a "robust and viable commercial market" for businesses within the state by funding the Department of Commerce and state civil courts, among other endeavors. The WCDC may avail itself of these commercial and judicial resources like any other business in the state. Furthermore, the state and the Wendat Band's interests align because the Wendat Band hopes to attract non-Indian buyers from other parts of the state to visit its museum and shop at its complex. State regulation of the commercial market would indirectly assiststhe Wendat Band in engaging non-Indian consumers by encouraging individual and state economic growth.

Second, the WCDC is on Maumee Land in the Topanga Cession, so the relevant tribal interest to be protected in this balancing test is the Maumee Nation's interest. There is no economic burden or adverse affect that falls on the Maumee

Nation as a result of the Transaction Privilege Tax; in fact, the Maumee Nation will benefit from the tax because it plans to use the remitted funds for tribal scholarships and economic development. Even when considering the Wendat Band tribal interest, there is no evidence that the Transaction Privilege Tax places more than a minimal burden on the tribe. The WCDC expects the gross sales of its commercial development to exceed $80 million annually. Its purpose in constructing and operating this development is to fund a public housing unit and a nursing care facility. The Wendat Band does not contend that payment of the Transaction Privilege Tax would be a financial burden or would hinder its purpose in any way.

To conclude this issue, neither the doctrine of infringement nor preemption prevents the State of New Dakota from applying its Transaction Privilege Tax to the WCDC in the Topanga Cession. The Topanga Cession is on the Maumee Reservation, and the Wendat Band is a nonmember entity. The state does not infringe on the sovereignty of the Maumee Nation by taxing another tribe on Maumee Reservation land. Federal and tribal interests do not preempt state taxation of the WCDC on Maumee Reservation land. Therefore, the WCDC should be required to pay the New Dakota Transaction Privilege Tax under 4 N.D.C. §212.

CONCLUSION

In conclusion, Petitioner respectfully requests that this Court reverse the decision of the Thirteenth Circuit and remand the case to the District Court to issue the requested Declaration—that the Topanga Cession is within the Maumee Reservation and that any WCDC commercial development in the Topanga Cession with more than $5,000 in gross sales is required to obtain the Transaction Privilege Tax license and to pay the tax to the State of New Dakota to be remitted to the Maumee Nation.