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

Team #T1017

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I. Indian rights established by a treaty may only be abrogated when Congress's intent is plain and clear. The Wendat Band of Huron Indians entered into a treaty with the United States ceding interest in their reservation except for a portion of land, which, prior to nature's shift of the Wapakoneta River, had been established as within the Maumee reservation under the Treaty of Wauseon. Did Congress intend to abrogate the Treaty of Wauseon?

Diminishment of an Indian reservation may only be authorized by Congress's express intent to alter the reservation's boundaries. The 1908 Allotment Act authorizes the Secretary of the Interior to survey the Maumee reservation, provide tribal members allotments, and allow surplus lands to be settled by non—Indians. Did the 1908 Allotment Act diminish the Maumee reservation? In addition, the 1892 Allotment Act provided a sum certain per acre for the surplus lands, while also authorizing the Secretary of the Interior to survey the lands and provide tribal members allotments within the Wendat reservation. Did the 1892 Allotment Act diminish the Wendat Reservation? If so, is the Topanga Cession located within Indian Country?

II. A state's regulatory authority is hindered by two independent barriers - the exercise of their authority may be preempted by federal law, or their authority may infringe upon tribal sovereignty. New Dakota imposed a Transaction Privilege Tax upon the Wendat Band in the Topanga Cession. If the tax infringes upon the Wendat Band's tribal sovereignty, should the law be subject to Indian preemption under Supreme Court precedent?

STATEMENT OF THE CASE

1. Statement of the Proceedings

The Maumee Nation filed a complaint against the Wendat Band asking the federal court for a Declaration that any development constructed by the WCDC in the Topanga Cession would require the procurement of a TPT license and payment of the tax because it is located on land belonging to the Maumee Nation. R. at 8. In the alternative, the Maumee Nation asked for a Declaration that the Topanga Cession was not Indian country at all, therefore, one-half of the TPT would be remitted to it under §212(6). *Id*. The Wendat Band argues that New Dakota is prohibited from imposing its tax on the Band's commercial development by both doctrines of infringement and preemption. R. at 4. The District Court issued the Maumee Indian Tribe its requested Declaration – that the Topanga Cession is within the Maumee Reservation and that any development by the WCDC of any commercial enterprise with more than $5,000 in gross sales is required to obtain the TPT license and pay the tax to New Dakota to be remitted to the Maumee Indian Tribe. R. at 9.

After this Court's decision in *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020), both parties were invited to submit supplemental briefs. The Thirteenth Circuit concluded that specific language of the Maumee Allotment Act of 1908 was ambiguous and the Treaty with the Wendat of 1859 made clear that the Maumee Nation's claim to the Topanga Cession had been abrogated. R. at 10. Furthermore, the court concluded that the TPT infringes upon tribal sovereignty and is subject to Indian preemption under Supreme Court precedent. R. at 11. After considering both parties positions at oral argument, the Thirteenth Circuit reversed the District Court's decision. The Maumee Nation argues that the Thirteenth Circuit erred in their interpretation of *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020) and the

court's opinion on infringement and preemption is contrary to stare decisis. The Maumee Nation requested certiorari, which this Court has granted.

2. Statement of the Facts

History: The Maumee Indian Nation and the Wendat Band of Huron Indians are federally recognized tribes of about 1,500 and 2,000 members with traditional lands in the State of New Dakota. R. at 4. Their traditional land claims overlap, which is common, but because their reservations share a border, both tribes argue over the ownership of the Topanga Cession. *Id*. The center of this dispute is whether or not the State of New Dakota can tax the commercial development of the Wendat Band that is located on the Topanga Cession. The Maumee Nation defends the state tax and argues that the Wendat development is within their reservation, therefore, they are entitled to 3.0% of the development's gross proceeds. *Id*. If the court disagrees, the Maumee Nation argues alternatively that the Wendat reservation has also been diminished and is therefore not in Indian county. This would entitle the Maumee Nation to 1.5% of the development's gross proceeds under state law. However, the Wendat Band argues that New Dakota is prohibited from imposing its tax on their development by the doctrines of infringement and preemption. *Id*. If the court disagrees, the Wendat Band argues that the development is located on the Wendat Reservation, and that any tax paid by the development would be returned to the Band under state law. *Id*.

Treaty: The Treaty of Wauseon establishes the boundaries of the Maumee Indian reservation. The treaty was ratified by Congress, without amendment, on February 8, 1802. R. at 17. Established in 1801, the Maumee tribe is reserved all the lands to the west of the Wapakoneta river. *Id*. The United States is permitted to allot all of the lands within this settled reservation to the Maumee tribe. *Id*.

The Treaty with the Wendat demonstrated the Wendat's consent to relinquish their interest in their reservation, except for a portion of land to the east of the Wapakoneta river. R. at 18. The treaty was ratified by Congress on November 19, 1859. *Id*. In return for the Wendat's consent to cede their interest in the reservation, the United States agreed to pay the tribe an annuity for the term of twenty years for two-hundred thousand dollars. *Id*. The legislative history for the Treaty with the Wendat proposes the desire for the Wendat tribe to receive the benefits from settlers in the same way the Maumee tribe benefitted since the Treaty of Wauseon. *Id*.

Tax: The Transaction Privilege Tax is a tax levied on the gross proceeds of sales or gross income of a business and paid to the state for the 'privilege' of doing business in that state. R. at 5. Both parties recognize the existence and legality of this TPT in New Dakota. 4 N.D.C. §212(1) provides that any person who receives gross proceeds of sales or gross income exceeding $5,000 and wishes to engage or continue their business shall apply to the department for an annual Transaction Privilege Tax license accompanied by a fee of $25. A person shall not continue engaging in business until this license has been obtained. R. at 5. Additionally, every licensee is required to remit to the state 3.0% of their gross proceeds of sales or gross income on transaction commenced in this state. *Id*.

According to the New Dakota Code §212(3) the proceeds of the Transaction Privilege Tax are paid into the state's general revenue fund for the purpose of maintaining a robust and viable commercial market within the state. This includes funding for the Department of Commerce, funding for civil courts which allow for the expedient enforcement of contracts and collection of debts, maintaining roads and other transport infrastructure which facilitate

commerce, and other commercial purposes. R. at. 6. However, New Dakota provides an exemption to the Transaction Privilege Tax.

4 N.D.C §212(4) recognizes the unique relationship between New Dakota and the twelve Indian tribes. The provision asserts that no Indian tribe, or tribal business operating within its own reservation on land held in trust by the United States is required to obtain a license or collect a tax. *Id*. In the present case, the Wendat Band stipulates that the WCDC purchased fee land has not been taken into trust and is not entitled to the automatic exemption from the Transaction Privilege Tax under §212(4). R. at 11. Because the State recognizes this unique relationship, §212(5) further provides that the State of New Dakota will remit to each tribe the proceeds of the Transaction Privilege Tax collected from all entities operating on their respective reservations that do not fall within an exemption. R. at 6. The Department of Revenue realizes that the Tribe could collect the tax itself, but by centralizing the collection of the tax to the State of New Dakota; the Department is providing the most efficient means of distributing the funds to the tribes. *Id*. §212(6) asserts that 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 county, 1.5% will be remitted to that tribe. *Id*.

Topanga Cession: It is undisputed that the Topanga Cession is land declared surplus during the allotment process. R. at 7. The tract of land was created as a result of the Wapakoneta river—the eastern border of the Maumee reservation—shifting three miles to the west during the 1830's. R. at 5. At the time the Maumee tribe entered into the Treaty of Wauseon, and thus establishing their reservation, the Topanga Cession was located within their reservation boundaries. *Id*. However, due to nature's uncontrollable circumstances, the

land is now located to the east of the Wapakoneta river. *Id*. The Topanga Cession is located in Door Prairie County and, according to the latest census data, approximately 17% of the land's population is classified as American Indian. R. at 7. In December 2013, the Wendat Band purchased a 1,400-acre tract of land from non—Indian owners located on the Topanga Cession. *Id*. Two years later, the Wendat proposed their plan to erect a combination of a residential and commercial development within the Topanga Cession, which included a shopping complex that would be owned by the Wendat Commercial Development Corporation. *Id*.

Business Activities: The complex the Wendat Band seeks to construct is a combination residential – commercial development which would include public housing, a nursing care facility for elders, a tribal cultural center, a tribal museum, and a shopping complex wholly owned by the Wendat Commercial Development Corporation (with 100% of corporate profits remitted quarterly to the tribal government.) R. at 8. The shopping complex will presumably include a café serving traditional Wendat cuisine, a grocery store offering both fresh and traditional foods, a salon/spa, a bookstore and a pharmacy. *Id*. The Wendat Commercial Development Corporation projects that this commercial development will support about 350 jobs and earn more than $80 million in gross sales annually. The proceeds will be used to fund the tribal public housing and nursing care facility. *Id*. The café, cultural center, and museum are expected to raise additional revenue by attracting non-Indian consumers who live outside the reservation. *Id*. Representatives from the Maumee Nation approached the WCDC and the Wendat Tribal Council to remind them that the Maumee Nation claims the Topanga Cession to be its land, and any dispute regarding land ownership was resolved when the Wendat Reservation was diminished by the 1892 allotment act. *Id*.

Therefore, the Maumee Nation expects the shopping complex to pay to New Dakota the 3.0% Transaction Privilege Tax. The tax would then be remitted back to the Maumee Nation in accordance with §212(5) because the WCDC is a nonmember business operating on land that belongs to the Maumee Nation. *Id*. The Maumee Nation explained their dire need for the funds because their largest source of revenue – timber harvesting – was being threatened by climate change which caused revenues to decline by over 12% a year. *Id*. The funds would also help pay for tribal scholarships and invest in renewable energy and additional forms of sustainable economic development. This would ensure basic services and jobs for Maumee tribal members. The Maumee Nation's necessity to obtain this tax is furthered by the fact that its average citizen's income is 25% lower than the average income of the Wendat tribal member. *Id*. Allowing the Maumee Nation to collect the TPT would improve the income of tribal members and would allow them to be avid consumers of goods and services at the WCDC's complex. *Id*.

SUMMARY OF ARGUMENT

This case has been incorrectly decided because the Topanga Cession is located in Indian country on the Maumee Reservation, not the Wendat Reservation. The Thirteenth Circuit erred in finding that the Treaty with the Wendat abrogated the Treaty of Wauseon. The purpose of the Treaty with the Wendat, found in the legislative history, makes it clear that Congress clearly intended to transfer land from the Wendat to the United States, not terminate rights provided under the Treaty of Wauseon. In addition, the statutory language of the Allotment Act of 1908 does not provide sufficient cession language to prove Congress's intent to diminish the Maumee reservation. The 1908 Allotment Act's legislative history bolsters this conclusion by proving that Congress merely intended to open the surplus lands

up for settlement, not complete a diminishment of the reservation. Moreover, the Thirteenth Circuit erred in their interpretation of *McGirt v. Oklahoma*, 591 U.S. __, 140 S. Ct. 2452 (2020). The 2020 Supreme Court decision supports a finding that the 1908 Allotment Act did not diminish the Maumee reservation.

However, if the court concludes that Congress intended to diminish the Maumee reservation, the Topanga Cession is not located within any Indian country due to Congress's clear intent to diminish the Wendat reservation. The inclusion of a sum certain price per acre for the surplus lands in the 1892 Allotment Act, plus the legislative history, demonstrates that Congress intended to diminish the Wendat reservation.

The Thirteenth Circuit also erred by ruling that the Transaction Privilege Tax infringes upon tribal sovereignty and is subject to Indian preemption under Supreme Court precedent. The Thirteenth Circuit failed to consider where the legal incidence of the tax fell. When the legal incidence of a tax falls upon nonmembers and non-Indians, no bar prevents the enforcement of a state tax. Furthermore, the Thirteenth Circuit's opinion on infringement and preemption is inconsistent with *Lee* and *Bracker*. Both cases assert that infringement is found when a state's action infringes upon the right of reservation Indians to make their own laws and be ruled by them, however, difficulty arises when a state's action infringes upon non-Indians and nonmembers. Because the WCDC is a nonmember entity, the rules of *Lee* and *Bracker* are inapplicable.

However, *Bracker* holds that when Congress intends to occupy a specific field, such occupation will be extensively pervasive leaving no room for a state's law to apply. Congress's intent is not apparent in the current case. Congress did not expressly nor impliedly intend to occupy a specific field of the WCDC's residential-commercial

development. Therefore, there is room for New Dakota's tax law to apply to the nonmember entity. Additionally, in order for preemption to be found the federal and tribal interests must outweigh the interests of the states. The Wendat Band did not express their intent to employ members of their tribe at the WCDC development, nor did they express substantial tribal involvement. On the contrary, New Dakota's regulatory interest is furthered because the funds of the TPT are paid into the state's general revenue fund which ensures the maintenance of the commercial market. Because the federal and tribal interests do not outweigh New Dakota's, preemption cannot be found.

ARGUMENT

Standard of Review. The standard of review in this case is a pure question of law and the questions are to be reviewed by a "de novo" standard. Reviewing, *de novo*, the Thirteenth Circuit erred in finding that the Treaty of Wendat of 1859 abrogated the Maumee Nations claim to the Topanga Cession and that the Wendat Allotment Act of 1892 did not diminish the Wendat Reservation. R. at 10. In addition, the Thirteenth Circuit erred in concluding the Maumee reservation has been diminished by the Allotment Act of 1908, and that the TPT infringes upon tribal sovereignty and is subject to Indian preemption. R. at 10.

I. There is no clear intent that Congress intended to abrogate the Treaty of Wauseon by entering into the Treaty with the Wendat.

Congress may abrogate Indian rights under a treaty if their intent to do so is unambiguous. *United States v. Dion*, 476 U.S. 734, 740 (1986). Although precise language is not required, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). Unable to present a universal, per-se rule, the Courts have used a variety of standards to determine whether Congress has intended to abrogate a pre-existing treaty. "What is essential 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." *Dion*, 476 U.S. at 740. To resolve this conflict, Courts look beyond the face of the abrogating Act, and look at the provision's legislative history and its surrounding circumstances. *Id.* at 739.

A. The purpose and legislative history of the Treaty with the Wendat shows that Congress did not intend to abrogate the Treaty of Wauseon.

To determine whether a treaty has been abrogated by Congress "[W]e look beyond the written words to the larger context that frames the treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). This Court held that a United States treaty entered into in 1837 with the Mille Lacs Band, which guaranteed the Band hunting, fishing, and gathering rights on land sold to the United States, had not been abrogated by a subsequent 1855 treaty. The 1855 treaty with the Chippewa created lands as reservations for the Mille Lacs Band in Minnesota, but it did not mention whether it honored rights guaranteed in previous treaties. *Id.* at 172. To determine whether the 1855 treaty abrogated the 1837 treaty, the court looked to the purpose of the subsequent treaty and the Senate report that was presented for ratification. *Id.* at 197-98. "The 1855 Treaty was designed primarily to transfer Chippewa land to the United States, not to terminate Chippewa usufructuary rights." *Id.* at 196. Similar to the 1855 treaty in *Minnesota*, the Treaty with the Wendat served a purpose for transferring Wendat land to the United States to provide land for settlers and improve their relations with the Wendat Band, not terminate rights under prior treaties. Senator Lazarus W. Powell of Kentucky states, "it is my hope that this treaty will secure the peace between the Wendat and the settlers and that the Wendat welcome their

neighbors with open arms—ready to receive from them all of the benefits of Christianity and civilization which our citizens are capable of sharing." Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859).

Similar to the 1855 treaty with the Chippewa in *Mille Lacs Band of Chippewa Indians,* the Senate negotiations for the Treaty with the Wendat also provide insight into the treaty's purpose. This Court also found it convincing that the senate report and memorandum submitted to ratify the 1855 treaty were silent about any hunting, fishing, and gathering rights. *Id.* at 198. Likewise, there is no mention in the Senate negotiations for the Treaty with the Wendat of an intention to eradicate the Maumee's land rights under the Treaty of Wauseon. In fact, the single mention of the Treaty of Wauseon was to provide an example of previous treaties that have successfully promoted the Treaty with the Wendat's purpose—civilize the Wendat Band by learning modern ideals from incoming settlers. Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). After mentioning the Maumee's reduction in population in their territory after passing the Treaty of Wauseon, Senator Lazarus W. Powell of Kentucky describes the successes that resulted from the treaty. "Their descendants have become among the most peaceable of Indians and trade and commerce between the Maumee and the noble residents of Fort Cosby have expanded to benefit both parties. I hope that the Wendat may benefit by example...." Cong. Globe, 35th Cong., 2nd Sess. 5411-12 (1859). It is unlikely that Congress intended to abrogate the Treaty of Wauseon with the passage of the Treaty with the Wendat by remaining silent on their intent to eradicate the rights given to the Maumee in the Senate report. In addition, it is unlikely that Congress intended to use the Treaty with the Wendat as an abrogation tool after explaining how successful the relations

have been between the Indians and settlers ever since the passage of the Treaty of Wauseon. Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859).

The legislative history for the Treaty with the Wendat is distinguished from the legislative history of the Eagle Protection Act in *United States v. Dion*, 476 U.S. 734 (1986), where the court held, "it seems plain to us, upon a reading the legislative history as a whole, that Congress...believed that it was abrogating the rights of Indians to take eagles." In 1858, the Treaty with the Yancton ceded four-hundred thousand acres to the United States in exchange for the Yancton's uninterrupted possession of their reserved land and did not place restrictions on the tribe's right to hunt. However, a member of the Yancton Tribe shot four bald eagles on the reservation and was convicted of violating the Eagle Protection Act—which prohibits the hunting of bald eagles anywhere in the United States. *Id.* at 736. In addition to the strong suggestion on the face of the Act, the court looked to the legislative history to support the conclusion that the Eagle Protection Act abrogated the Treaty with the Yancton. *Id.* at 740. Prior to the Senate and House hearings on the Act, amendments were proposed, heard in front of the Congressional committees, and eventually included, which provided a narrow exception for Indians to take the feathers of the Eagle for their religious uses. *Id.* at 743. Therefore, Congress considered the rights provided under the Treaty with the Yancton and chose to abrogate those hunting and gathering rights by only allowing eagle feathers to be taken under limited circumstances. *Id.* at 734-35.

There is no evidence that Congress actually considered the impact the Treaty with the Wendat would have on Indian's rights granted in the Treaty of Wauseon and then chose to abrogate those rights. This is distinguished from *Dion*, where the court found, "Congress thus considered the special cultural and religious interests of Indians, balanced those against the

conservation purposes of the statute, and provided a specific, narrow exception that delineated the extent to which Indians would be permitted to hunt bald and golden eagles." *Id* at 734 – 44. Circumstantial evidence provided by the legislative history shows that through the Senate and House committee hearings, Congress actually considered Indian's hunting rights in prior treaties, and chose to only provide a narrow exception for hunting bald and golden eagles for religious ceremonies. However, there is no evidence in the legislative history for the Treaty with the Wendat that Congress considered the boundary line established for the Maumee tribe in the Treaty of Wauseon and chose to abrogate that boundary in the Treaty with the Wendat.

II. Congress did not intend to diminish the Maumee reservation's boundaries with the passing of the Allotment Act of 1908.

In order for an Indian tribe's reservation to be diminished by Congress, there must be an express intent to diminish the boundaries established by the reservation. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of the individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. Explicit, congressional intent to diminish a reservation is established by looking to the statutory language, whether the tribe was compensated for the opened land, negotiations of the tribe's compensation, legislative history surrounding the act, and Congress's actions after the land has been opened. *Id.* at 470—72.

A. The statutory language of the Allotment Act of 1908 does not provide clear evidence of Congress's intent to diminish the Maumee reservation.

Intent to diminish a reservation can be demonstrated by the language used in the Allotment Act to open the Indian lands. "Explicit reference to cession or other language

evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* at 470. When Congress simply opens the Indian's reservation to allow portions to be owned by non—Indian settlers, courts are reluctant to find a clear intent to diminish the reservation. For example, the court in *Solem v. Bartlett*, 465 U.S. 463 (1984) held "the Act of May 29, 1908, read as a whole, does not present an explicit expression of congressional intent to diminish the Cheyenne River Sioux Reservation." *Id.* at 475—76. The relevant provisions of the Act authorized the Secretary of the Interior to "...sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota...." *Id.* at 472—73. The Act also provided "...the proceeds arising from the sale and disposition of the lands aforesaid..., there shall be deposited in the Treasury of the United States...the sums to which the respective tribes may be entitled." *Id.* at 473. The court found that "this reference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent." *Id*. Instead of resembling an express agreement with the Indians, the Act simply authorized the Secretary of the Interior to provide for the sale of portions of land.

The language of the Maumee Allotment Act of 1908 is comparable to the language of the Act of May 29, 1908 from *Bartlett.* Similar to the language of the Act in *Bartlett,* there is no evidence of any specific cession language that would destroy Indian interests. Rather the Secretary of the Interior is simply being authorized to act as the Maumee tribe's land representative. R. at 13. The Secretary of the Interior is authorized to survey the reservation, reserve lands that may be required for future public interests, and manage the amount given to Indians who have relinquished their allotment. R. at 13—14. Also similar to the language

in *Bartlett*, the statutory language does not establish an express agreement, but does nothing more than provide a method for non—Indians to settle on the reservation.

The language of the Allotment Act of 1908 is distinguished from statutory language resembling an agreement between Congress and the Indian tribe. For example, in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), the court held "...the 1894 Act at issue here—a negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment—bears the hallmarks of congressional intent to diminish a reservation." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 345 (1998). The statute in *Yankton Sioux Tribe* provided "that the Tribe will cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands...[and] pursuant to Article II, the United States pledges a fixed payment of $600,000 in return." *Id.* at 344. When there is explicit language of cession— "the present and total surrender of all tribal interests"—plus a provision providing for a fixed sum for the tribe's compensation, there is a strong presumption of reservation diminishment. *Id*.

The resemblance the 1894 Act had to an express agreement with the Yankton Sioux Tribe, is not comparable to the language of the 1908 Allotment Act, which simply provides a method for non—Indians to settle on the Maumee reservation. The language in the Allotment Act of 1908, ceding the surplus lands to the United States, is ambiguous and not sufficiently explicit to establish an agreement with the Maumee Indians probative of an intent to diminish the reservation. First, compared to the language of the Act in *Yankton Sioux Tribe*, there is no clear language that provides a clear resemblance to an agreement between the United States and the Maumee tribe to "...cede, sell, relinquish, and convey...all their claim, right, title, and interest in and to all the unallotted lands within...the reservation." *Id*. The cession language

returning the surplus lands to public domain in the 1908 Allotment Act, by itself, is not sufficient to prove the "present and total surrender of all tribal interests." In addition, when courts are presented with ambiguous statutory language that may suggest an intent to diminish, "...doubtful expressions are to be resolved in favor of the weak and defenseless people...dependent upon its protection and good faith." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

Next, the language further suggests the statute is simply a method for non—Indians to settle on the reservation because the 1908 Allotment Act does not contain a fixed sum to compensate the Maumee tribe for the sales of surplus lands. In addition to explicit cession language, a precise sum of payment represents a present commitment from Congress to compensate the tribe for the sale of land. *Id*. However, when there is merely a fund established that indirectly compensates the Tribe for the sale of surplus lands, courts are discouraged from finding an express agreement for the tribe to be compensated.

Failing to find a clear intent by Congress to diminish the Klamath River Reservation, the court in *Mattz v. Arnett*, 412 U.S. 481(1973) held "...the [1892] Act did no more...than open the way for non—Indian settlers to own land on the reservation...." Similarly, the court in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962) found a 1906 Act to merely provide a way for non—Indians to settle on the Colville Indian Reservation. The court in *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425 (1975) distinguished an 1891 Act from the Act's found in *Arnett* and *Superintendent of Washington State Penitentiary* where diminishment was not established, finding "the 1891 Act does not merely open lands to settlement; it also appropriates and vests in the tribe a sum certain—$2.50 per acre—in payment for the express cession and

relinquishment of all of the tribe's claim, right, title, and interest in the unallotted lands." The key distinction between the Acts was that "the statute in *Arnett*...benefitted the tribe only indirectly...by establishing a fund dependent on uncertain future sales of its land to settlers." *District County Court for Tenth Judicial Dist.,* 420 U.S. at 448. Furthermore, the statute in *Superintendent of Washington State Penitentiary* "...merely opened the land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indian's benefit." *Id.* at 448.

Here, the language found in the Allotment Act of 1908 also establishes a fund, dependent on the uncertain future sales of unallotted land, and without a specific sum, similar to the Acts found to lack a clear intent to diminish reservations in *Arnett* and *Superintendent of Washington State Penitentiary.* The Allotment Act of 1908 states "that nothing in this law provides for the unconditional payment of any sum to the Indians but that the price of said lands actually sold shall be deposited with the United States treasury to the credit of the Indians." R. at 14. Compared to the explicit language used in *District County Court for Tenth Judicial Dist.*, where Congress clearly intended to diminish the Lake Traverse Reservation, the Allotment Act of 1908 does not automatically vest the tribe with a fixed sum for the sale of unallotted lands, but merely establishes a fund, whose benefits are uncertain. The uncertainty and dependence on the sales of the unallotted lands fails to show Congress intended to reach a complete agreement with the Maumee tribe for the diminishment of their reservation.

Finally, Congress still did not intend to diminish the Maumee reservation despite the Allotment Act's reference to returning the eastern quarter surplus land to public domain. R. at 13. The Act in *Bartlett* also referenced opened lands being classified as public domain but

balanced the classifications against the Act's stated goal finding "[T]hese isolated phrases [to be] hardly dispositive." *Bartlett,* 465 U.S. at 467. Here, the stated goal of the Allotment Act—create a way for non—Indians to settle on the Maumee reservation—balanced against the phrase providing for surplus lands be returned to public domain, justifies the absence of express intent required to justify the diminishment of the Maumee reservation.

B. The legislative history shows that Congress intended to open the Maumee reservation for settlement by non—Indians, not effectuate a diminishment.

The absence of an express statement in the legislative history tending to prove an Indian tribe agreed to cede all interest in surplus lands, shows that Congress intended to simply provide an opportunity for non—Indians to settle—not perform a diminishment of the reservation. Analyzing the legislative history of the Cheyenne River Act, the court in *Solem v. Bartlett*, 465 U.S. 463 (1984) held that "...in the absence of some clear statement of congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish the Cheyenne River Sioux Reservation." *Bartlett*, 465 U.S. at 478. The Senate and House reports provided a dismal number of phrases that could provide a clear intent to diminish the entire Tribe's reservation. *Id.* "Both the Senate and House Reports refer to the "reduced reservation" and state that "lands reserved for the use of the Indians upon both reservations as diminished...are ample...for the present and future needs of the respective tribes." *Id.* In addition to Congress's failure to mention the effect the Cheyenne River Act would have on the reservation's boundaries, the isolated phrases mentioning a reduced reservation and diminishment, without more, were not sufficient to prove a clear intent to diminish the reservation. *Id*.

The Allotment Act of 1908's legislative history contains a similar number of references suggesting diminishment as the isolated phrases in *Bartlett* where the court was unable to find a clear intent by Congress to diminish the reservation. For example, the debate highlights Congress's discussion with the Commissioner of Indian affairs and "...after spending a considerable time [with the Maumee] had a written agreement with them in regard to the disposal of this reservation." 42 Cong. Rec. S. 2418, 2347 (1908) (statement of Mr. Hackney). In addition to this isolated phrase, there is also discussion addressing the disadvantages that come with living on a reservation. This dialogue suggests that immersing the tribe with non—Indian settlers will benefit the Maumee and they need to "...let homeowners and home builders come in with their influence and make the Indian citizen what we all hope for him and expect him to be." 42 Cong. Rec. S. 2418, 2348 (1908) (statement of Mr. Ferris).

However, a close reading of the House report provides ample evidence that Congress merely intended to open the reservation up for settlement by homeowners and builders. For example, "this bill is on all fours with all of the bills of this character opening up Indian reservations." 42 Cong. Rec. S. 2418, 2348 (1908) (statement of Mr. Stephens). In addition, after discussing the disadvantages of life on the reservation, Mr. Ferris stated in support of the bill, "I believe it will aid the Indian. I believe that it will even aid this Congress to open up those lands and let them be settled by home builders and homeowners." 42 Cong. Rec. S. 2418, 2348 (1908) (statement of Mr. Ferris). Accepting these isolated phrases inferring an intent to diminish the Maumee reservation, and in light of multiple references proving an intent to merely open the lands for settlement, would be to welcome ambiguous, detached statements as sufficiently clear intent by Congress to diminish a reservation.

C. The correct interpretation of *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020) supports a finding that the 1908 Allotment Act did not diminish the Maumee reservation.

Congress may have created a process for diminishment by passing Allotment Acts, but allotment, without express cession language, does not provide evidence of a clear intent by Congress to diminish the reservation. "To equate allotment with disestablishment would confuse the first step of a march with arrival at its destination." *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020). In rejecting the argument that allotments automatically diminish reservations, the court in *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020) found that Oklahoma failed to show how the Creek Allotment Act established "...the present and total surrender of all tribal interests in the affected lands." The Creek Allotment Act "...established procedures for allotting 160-acre parcels to individual Tribe members who could not sell, transfer, or otherwise encumber their allotments for a number of years." *McGirt*, 140 S. Ct. 2452 at 2463. Recognizing that allotment laws may be a condition for diminishing a reservation in the future, the court in *McGirt* states, "...just as wishes are not laws, future plans are not either." *Id*. at 2465. When Congress intended to establish an allotment and intend to diminish a reservation at the same time, "...Congress included additional language expressly ending reservation status." *Id*. Failing to find any additional language expressly ending reservation status, the Creek Allotment act, "...in using the language that they did...tracked others of the period, parceling out individual tracts, while saving the ultimate fate of the land's reservation status for another day." *Id*.

The Allotment Act of 1908 contains similar procedural, allotment language and should be interpreted as supporting the Maumee's continued reservation status. Here, similar to the Act in *McGirt*, a procedure is established for allotting the lands to the Maumee tribe members by

"...first survey the entire Maumee Reservation into townships. After the survey is complete the Secretary shall permit the Indians to select their individual allotments...." R. at 13. After the land has been surveyed, the 1908 Allotment Act also provides for an appraisement process where "the President...shall appoint a commission to inspect, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians." R. at 13—14. The need for the Secretary of the Interior's survey of the reservation, plus the appraisement process, provides evidence that perhaps a procedure has been initiated for the diminishment of the reservation—not a present cession of Indian interests.

Despite the isolated reference returning the eastern portion of the reservation to public domain, the legislative history also bolsters the conclusion that the 1908 Allotment Act merely installs a procedure intending to eventually diminish the Maumee reservation. For example, after recognizing the benefits the settlers may bring to the Indian, Mr. Ferris states, "they need to go onto...an allotment to make it a home; they need to have the other vacant lands in that community occupied and let homeowners and home builders come in with their influence...." 42 Cong. Rec. S. 2418, 2348 (1908) (statement of Mr. Ferris). Further, after promoting the policy of allotments, Mr. Stephens states, "in pursuance of this policy [of allotments] we have opened up a great many reservations in the United States, and I hope we will follow out this policy and that in a few years there will not be a single Indian reservation left in the borders of this whole country." 42 Cong. Rec. S. 2418, 2348 (1908) (statement of Mr. Stephens). These phrases encouraging allotment are not sufficient to establish a clear intent to diminish the reservation, rather they serve as a condition to diminishing the Maumee reservation—the "ultimate fate" of the reservation being reserved for another time.

In addition, the court in *McGirt* disparages the argument that the subsequent, voluminous influx of non—Indian settlers within a certain tract of land is probative of diminishment. "The only role such [extratextual sources] can properly play is to help clear up...not create ambiguity about a statute's original meaning." *McGirt*, 140 S. Ct. 2452 at 2469. The court states that, by itself, these facts are not sufficient to result in diminishment. *Id*. at 2468. Therefore, the fact the Indian population gradually declined in the Topanga Cession—land declared surplus—cannot overcome the clear intent by Congress to merely open the lands to settlement. The utility of extratextual evidence, such as subsequent demographics, is limited to interpreting "...what the terms of the statute meant at the time of the law's adoption, not as an alternative to proving...diminishment." *Id*. at 2469.

III. If the court determines the Maumee reservation has been diminished, then the diminishment of the Wendat reservation demonstrates that the Topanga Cession is not located in Indian Country.

Clear intent of diminishment through the explicit reference to cession, "...evidencing the present and total surrender of all tribal interests, and a provision for a fixed—sum payment, representing an unconditional commitment from Congress to compensate the Indian tribe for its opened land...", provides conclusive evidence of diminishment. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). The statute in *Yankton Sioux Tribe* paralleled an agreement between the tribe and the United States for all surplus lands on the reservation where the government "...agreed to compensate the Tribe in a single payment of $600,000 which amounted to $3.60 per acre." *Yankton Sioux Tribe*, 522 U.S. at 338. The court found this to demonstrate a negotiated agreement for the total relinquishment of tribal claims "...in exchange for a fixed payment [that] bears the hallmarks of congressional intent to diminish a reservation." *Id*. at 345.

Similar to the language in *Yankton Sioux Tribe*, the 1892 Allotment Act contains a sum certain per acre for the surplus lands, indicating a present commitment from Congress to compensate the Wendat tribe for their land. R. at 15. "The United States agrees to pay into the Treasury, in the name of the Wendat Band, the sum of three dollars and forty cents for every acre declared surplus...." *Id*.

Although the plain terms of the statute are scarce in containing evidence of express cession, the surrounding circumstances, plus the inclusion of a sum certain per acre, illustrate Congress's clear intent to diminish the Wendat reservation. "Even in the absence of a clear expression of congressional purpose in the text of the surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton Sioux Tribe*, 522 U.S. at 351.

First, debate on the House floor states, "the good work of reducing the larger Indian reservations, by allotments in the severalty to the Indians and the cession of the remaining lands to the United States for disposition under the homestead law, has been prosecuted during the year with energy and success." 23 Cong. Rec. 1778—79 (1892) (statement of Mr. Ullrich). The context surrounding this excerpt indicates that Congress had cession in mind as a result of reducing reservations. Next, despite the numerous references to the need for "opening the lands for settlement", the legislative history indicates Congress did not intend to leave the Wendat reservation intact after allotments. "...The Wendat are the most distinctly warrior Indians left on the continent today; that they keep themselves farther away from white people and have less to do with them than any others...and hence they are wholly wild and savage..." 23 Cong. Rec. 1779 (1892) (statement of Mr. Mansur). This animosity towards the Wendat Indians, and desire to allow non—Indians to settle the open lands, indicates a

desire to diminish the reservation. Compared to the discussion surrounding the Maumee Allotment Act, where exchanges between Congressmen clearly indicated a desire to integrate the Maumee Indians and incoming settlers.

The inclusion of a sum certain per acre for the surplus lands, indicating an express intent for Congress to compensate the tribe, plus the explicit references to cession and animosity towards the Wendat way of life found in the legislative history, provides a clear intent by Congress to diminish the Wendat reservation.

IV. The State of New Dakota did not infringe upon the Wendat Band's tribal sovereignty and should not be preempted by federal law.

The Thirteenth Circuit erred in their interpretation of Indian preemption and infringement regarding the State of New Dakota's collection of its Transaction Privilege Tax as it is contrary to stare decisis. The sovereignty of Indian tribes has been implicitly divested in certain aspects of their dependent status, and under certain circumstances, a State may validly assert authority over the activities of nonmembers on a reservation, and that in "exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32. The determinative issue in Indian tax cases is who-is-being taxed, which determines where the legal-incidence of the tax falls.

The United States Constitution provides Congress with broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3. This congressional authority and "semi-independent position" of Indian tribes gives rise to two independent barriers to the assertion of state regulatory authority over tribal reservations and members. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). First, the exercise of their authority may be preempted by federal law. *Id*. Second, it may unlawfully infringe "on the right of

reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220.

The two barriers are independent because either, standing alone provides a sufficient basis for holding state law inapplicable to activity on the reservation or by tribal members. *Bracker*, 448 U.S. at 143. Though independent, the barriers are related; the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. *Id*. An express congressional statement is not necessary in order to find a particular state law to have been preempted by federal law, however, any applicable regulatory interest of the State must be given weight. *Id*. at 144.

A. The Transaction Privilege Tax furthers the regulatory interest of New Dakota and the Wendat Band does not fall under any exemption to the tax, therefore, New Dakota will remit the proceeds of the tax collected back to the Maumee Nation.

By levying the Transaction Privilege Tax upon the Wendat Band, the State of New Dakota furthers their regulatory interest; for instance, the proceeds collected from the tax will be used for maintaining the commercial market of the state. 4 N.D.C §212(2) provides that every licensee is obligated to remit to the state 3.0% of their gross proceeds or gross income on transactions commenced in this state. R. at 5. Because of this provision, the Wendat Band is required to remit to the State of New Dakota 3.0% of their gross proceeds of sales from their business activities that occur on the Maumee reservation. In furtherance of New Dakota's tax, the Maumee Nation receives substantial benefits as well. The Maumee's largest source of revenue – sustainable timber harvesting is being threatened by climate change, therefore, the funds the tax would bring in are crucial to the Maumee's economic survival.

In accordance with the exemption under §212(4) is 25 U.S.C. §5108, which authorizes the Secretary of Interior to acquire land in trust for Indians and that the land shall be exempt

from State and local taxation. In the present case, the Wendat Band stipulates that the WCDC purchased fee land has not been taken into trust and is not entitled to the automatic exemption from the Transaction Privilege Tax under §212(4). R. at 11. Because the State recognizes their unique relationship with the tribes, §212(5) further provides that the State of New Dakota will remit to each tribe the proceeds of the Transaction Privilege Tax collected from entities operating on their reservations that do not fall under an exemption. The Wendat Band stipulated that they did not fall under an exemption, therefore, New Dakota will remit 3.0% of the gross proceeds collected from the Wendat Band back to the Maumee Nation. However, in the alternative, if both the Maumee and Wendat reservations are diminished, then the Maumee Nation will only be entitled to 1.5% of the TPT in accordance with §212(6).

B. New Dakota has jurisdictional authority to assert the tax over the Wendat Band because they are a nonmember business.

The State of New Dakota has jurisdictional authority to levy a tax on the Wendat Commercial Development Corporation because they are a nonmember business conducting activities on land that is a part of the Maumee reservation. Such authority may only be asserted if it is not preempted by federal law. *Mescalero Apache Tribe*, 462 U.S at 333. The Court in *Bracker* extracted several principles in order to determine whether or not federal law preempts the assertion of State authority over nonmembers on a reservation. *Id*. This Court stated that the determination does not depend on "mechanical or absolute conceptions of state or tribal sovereignty, but calls for a particularized inquiry into the nature of the state, federal and tribal interests at stake" – essentially, a balancing test. *Bracker*, 448 U.S. at 145. However, the determinative issue in Indian tax cases is where the legal incidence of the tax falls.

C. The legal incidence of New Dakota's tax falls upon nonmembers and non-Indians and are not exempt from state taxation.

1. The legal incidence of the tax falls on the WCDC, a nonmember tribal entity that is not exempt from state taxation.

It is understood that when the legal incidence of a tax falls on a tribe or tribal member for sales made inside Indian country, the tax cannot be enforced unless there is clear congressional authorization. *Oklahoma Tax Comm'n. v. Chickasaw Nation*, 515 U.S. 450, 459 (1995). Here, the legal incidence of the tax does not fall on a tribe or tribal member. It falls on a nonmember entity, the WCDC, a Section 17 IRA Corporation. As this Court has held, the mere fact that "nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934… 25 U.S.C. §479, does not demonstrate a congressional intent to exempt such Indians from state taxation." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980).

In *Confederated Tribes of Colville Indian Reservation*, the State of Washington imposed a cigarette tax on the sale, use, consumption, handling and distribution of cigarettes within the State. *Id*. at 134. The Tribes contend that their involvement in the operation of cigarette marketing on the reservation ousts the State from any power to exact its sales and cigarette taxes from nonmembers purchasing from tribal smoke shops. *Id*. at 154. The Tribes argued that the cigarette sales generated substantial revenue for the Tribes which they needed for essential governmental services. *Id*. However, most cigarette purchasers were outsiders attracted to the reservation by the cheap prices the shops would charge by virtue of their claimed exemption from state taxation. *Id*. The Tribes argued that the state taxes on tribal members are preempted by federal statutes regulating Indian affairs; and that they are inconsistent with tribal self-government. *Id*. The Court states that the smoke shops offer an

exemption from state taxation, which is not offered elsewhere, and the principles of federal Indian law do not authorize Indian tribes to market an exemption from state taxation to persons who would normally do business somewhere else. *Id*. at 155. Therefore, the Court concludes that the state taxes are not preempted by federal law, and the tax is upheld. *Id*. at 161.

The facts of *Confederated Tribes of Colville Indian Reservation* are similar to the present case. The Wendat Band argues that preemption bars the enforcement of the New Dakota tax, however, their argument is without merit. Like the Colville Tribe, the Wendat Band asserts that they cannot be taxed as tribal members because it would infringe upon Indian sovereignty. However, this Court has held that federal Indian law does not authorize Indian tribes to market an exemption from state taxation. *Id*. at 155. It is undisputed that the WCDC is an entity of the Wendat Band, but this does not exempt this nonmember from taxation. Nor would the imposition of New Dakota's tax on this entity infringe on the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing tribes. *Id*. at 161. The Wendat Band's members fall within the definition of 'Indian' for purposes of tribal recognition, however, that does not classify them as members of the Maumee Nation. The fact of the matter is that the Wendat Band stands on the same footing as non-Indians resident on the reservation. *Id*.

2. Non-Indians are not exempt from New Dakota's tax because the legal incidence falls upon them as well.

The Maumee Nation argues that the WCDC is a nonmember entity conducting business on land that belongs to the Maumee reservation. In furtherance of this argument, the residential-commercial business plan of the WCDC is intended to generate business from non-Indians; thereby imposing the legal incidence of the tax to fall upon non-Indians as well.

When the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax because the State's requirement that Indian tribal sellers collect a valid tax "imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Chickasaw Nation*, 515 U.S. at 459.; *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976).

In *Confederated Salish and Kootenai Tribes of Flathead Reservation*, (1976) the tribes brought an action against the state of Montana challenging Montana's cigarette sales tax of non-Indians because it interferes with the tribe's freedom from state regulation. *Id*. at 482. However, the Court holds that requiring the tribes to collect an otherwise valid tax from non-Indians is a minimal burden to avoid the likelihood that non-Indians will avoid payment of a "concededly lawful tax" and therefore, does not frustrate tribal self-government, nor does it run afoul of any congressional enactment dealing with the affairs of reservation Indians. *Id*. at 483.

The facts are similar to the present case because the legal incidence of the tax falls on the non-Indians who are lured to the shopping complex by the business activities the Wendat Band has put on display. Collecting this tax from non-Indian consumers does not pose a significant burden on the Wendat Band because without it, the non-Indian consumers would escape payment of lawful taxes. By building this residential-commercial shopping complex and attracting non-Indian consumers, the Wendat Band wishes to benefit financially from the privilege of conducting business in the state of New Dakota. The cultural aspects of the shopping complex should entice non-Indian consumers to frequent there, not the fact that the WCDC is exempt from taxation. What the WCDC shopping complex offers their non-Indian

customers is what is not available elsewhere, an exemption from state taxation. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 155. The imposition of this tax upon nonmembers and non-Indians does not infringe on the principle of tribal self-government, for the simple reason that nonmembers, and non-Indians are not constituents of the governing tribe. *Id*. at 161

D. The State of New Dakota did not infringe on tribal sovereignty by collecting the tax because their ability to regulate themselves as a tribe is not hindered.

The Wendat Band argues the Transaction Privilege Tax likely infringes upon tribal sovereignty. The question to ask when determining the existence of infringement is whether or not the state's action infringes upon the right of reservation Indians to make their own laws and be ruled by them. *Lee,* 358 U.S. at 220. When on-reservation conduct involves only Indians, state law is generally inapplicable because the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest; however, difficulty arises when a State asserts authority over non-Indians engaging in conduct on the reservation. *Bracker*, 448 U.S. at 144.

In *Bracker*, the State of Arizona intends to apply a motor carrier license and use fuel tax upon the logging and hauling operations of Pinetop, an enterprise of the White Mountain Apache Tribe. *Id*. at. 137-38. The Tribe contends that the taxes represent an unlawful infringement on tribal self-government. *Id*. at 138. According to 25 U.S.C.A. § 405, Congress granted broad authority to the Secretary of Interior to oversee the sale of timber on the reservation. *Id*. at 145. The Secretary is granted power to determine the disposition of the proceeds from timber sales. *Id*. at 146. Pursuant to his authority, he implemented a detailed set of regulations to govern the harvesting of tribal timber. *Id*. at 147. Among the objectives of the regulations is the "development of Indian forests by the Indian people for the purpose

of promoting self-sustaining communities, to the end that the Indians may receive from their own property…the benefit of whatever profit it is capable of yielding…." *Id*. at 147. Allowing the state to impose the tax would hinder the tribe's ability to harvest timber and would deprive them the privilege of tribal self-government. *Id*. at 148-49. This Court held that the federal regulatory scheme was extensively pervasive, thus leaving no room for the state law to apply.

The United States Constitution affords Congress the power to regulate commerce with Indian Tribes. Art. 1, § 8, cl. 3. In *Bracker,* the regulation of tribal timber by the Secretary of Interior was so pervasive it was indicative of Congress's intent to occupy the entire field, leaving no room for the state law to apply. Like *Bracker,* New Dakota intends to impose a tax upon an enterprise of the Wendat Band, the WCDC. However, *Bracker* is contrary to the present case because the WCDC intends to build a residential-commercial shopping complex with a café, museum, and grocery store – which cannot be classified as a specific 'field'.

If Congress wanted to regulate all of these establishments, they have not expressly nor impliedly demonstrated their intent to occupy a specific field, which leaves room for New Dakota's tax law to apply to the WCDC. Although state taxation of this nonmember entity may affect the Wendat Band's revenue directly, or even indirectly, this Court has held that a negative effect on tribal revenue is not enough to result in infringement or preemption. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 136. Therefore, the application of the Transaction Privilege Tax cannot be said to infringe on the WCDC's tribal sovereignty.

E. Federal law does not preempt New Dakota's tax law because the federal and tribal interests do not outweigh the states.

The Wendat Band argues that the tax infringes upon tribal sovereignty and is subject to Indian preemption under Supreme Court precedent. State jurisdiction is preempted by federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority. *Mescalero Apache Tribe,* 462 U.S. at 334.*; Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1108 (9th Cir. 1997). The Tribes and the Federal Government are both committed to the promotion of tribal self-sufficiency and economic development. *Mescalero Apache Tribe*, 462 U.S. at 335. Part of this commitment provides the tribes with the power to manage the use of their territory and resources. *Id*.

The Wendat Band stipulates that the Wendat Commercial Development Corporation (WCDC) is a Section 17 IRA Corporation wholly owned by the Wendat Band. When Congress passed Section 17 of the Indian Reorganization Act (IRA) in 1934, their intent was to provide tribes with the power to incorporate, in order to waive sovereign immunity, "thereby facilitating business transactions and fostering economic development and independence." *Am. Vantage Companies, Inc. v. Table Mt. Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002), as amended on denial of reh'g (July 29, 2002). Therefore, when a State wants to exercise authority, it must be justified by functions or services performed by the State in connection with the on-reservation activity. *Mescalero Apache Tribe,* 462 U.S. at 336.

The Wendat Band's argument that New Dakota's tax is preempted by federal law is without merit because the federal and tribal interests do not outweigh the states. The proceeds from the Transaction Privilege Tax are paid into the state's general revenue fund which ensures the maintenance of the commercial market in New Dakota. This includes funding for the Department of Commerce, funding for courts, and maintaining roads and

other transport infrastructure which facilitates commerce, and other commercial purposes. R. at 6.

In *Yavapai-Prescott Indian Tribe v. Scott,* the Yavapai Tribe constructed a hotel and maintained that the federal and tribal interests in the activities taxed outweighed the State's, and as a matter of federal law the state was preempted by exercising its taxing power. *Id.* at 1109. The court found that the bulk of the funding for the hotel came from non-tribal and non-federal sources, the tribal contribution to the quality of the food served at the hotel was minimal, and the Tribe did not have an active role in the business of the hotel; these were factors that weighed against preemption. *Id.* at 1111. The court concluded that the State's tax law was not preempted and found in favor for the State of Arizona. *Id.* at 1113.

The facts of *Scott* are similar to the present case. Here, the Wendat Band would be receiving the bulk of the funding for the public housing and nursing care facility from non-Indians, since "the café, cultural center, and museum are expected to be particularly helpful in raising revenue by attracting non-Indian consumers." R. at 8. Additionally, the Wendat Band seeks to sell both fresh and traditional foods in their grocery store, which means that about 50% of their products will only come from tribal contribution, and the rest of their products will come from outside sources. Finally, the Wendat Band has not stated their intent to specifically employ members of their tribe, nor how the revenue will contribute to the economic well-being and self-sufficiency of their Tribe. This indicates that the Wendat Band will not have an active role in running the businesses on the reservation. New Dakota's interest in taxing the Wendat Band outweighs any federal interest that may exist in preventing the State from imposing its taxes. Therefore, federal law does not preempt state law.

CONCLUSION

The District court arrived at the correct conclusion in finding the Topanga Cession to clearly be located within the Maumee reservation, and that the Treaty of Wauseon remained intact, therefore, entitling the Maumee to the 3% Transaction Privilege Tax. But the Thirteenth Circuit erred in finding abrogation of the Maumee's claim to the Topanga Cession and in their interpretation of *McGirt*. Congress did not intend to diminish the Maumee reservation, and *McGirt* supports this conclusion. There is an obvious difference between allowing surplus lands to be opened for settlement, a without clear, congressional intent, courts should not infer diminishment. Nonetheless, even if the court finds that the Maumee reservation has been diminished, the tribe should still be remitted 1.5% of the Transaction Privilege Tax. Congress provides a clear example of intending to diminish a reservation with the elimination of the Wendat reservation.

The District Court reached the proper conclusion by allowing New Dakota to levy the Transaction Privilege Tax upon the WCDC because nothing in *Lee* nor *Bracker* states otherwise. However, the Thirteenth Circuit erred in concluding that the tax infringes upon tribal sovereignty and should be preempted by federal law based off of Supreme Court precedent. The legal incidence of the tax falls upon nonmembers, and non-Indians, therefore, the imposition of the tax cannot be said to infringe upon tribal sovereignty. It is apparent in *Bracker*, that when Congress intends to occupy a specific field, such occupation will be extensively pervasive; thus, leaving no room for a state's law to apply. Congress's intent is not apparent in the current case. Furthermore, preemption cannot be found because the federal and tribal interests do not outweigh the interests of New Dakota's.