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 NO. T1023

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QUESTIONS PRESENTED

ABROGATION & DIMINISHMENT

Did the Treaty with the Wendat of 1859 abrogate the Treaty of Wauseon and/or did the Maumee Allotment Act of 1908 diminish the Maumee Reservation? If so, did the Wendat Allotment Act also diminish the Wendat Reservation or is the Topanga Cession outside of Indian country?

PREEMPTION & INFRINGEMENT

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

STATEMENT OF CASE

STATEMENT OF PROCEEDINGS

The litigation of this case began when the Maumee Indian Nation ("Maumee Nation") filed a complaint in federal court requesting a Declaration. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018). The District Court of New Dakota was asked to declare: first, that any development by the Wendat Commercial Development Corporation ("WCDC") in the Topanga Cession required a Transaction Privilege Tax ("TPT") license. *Id.* at 8. Secondly, under the New Dakota statute, 4 N.D.C. §212(5), any proceeds from the WCDC should be remitted to the Maumee Nation because it is located on their reservation. *Id.* at 4. In asking the District Court to examine if the Maumee Reservation had been diminished, the Maumee Nation also asked the Court to review if the Topanga Cession was within Indian country. *Id.* The District Court ruled in favor of the Maumee Nation, and held the reservation had not been diminished. *Id.* at 9. Also, the Court's ruling allowed the State of New Dakota to enforce the TPT against the WCDC, requiring them to get a TPT license and pay a tax. *Id.* Then, the Wendat Band appealed. After the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the parties were asked to file supplemental briefs. The Thirteenth Circuit reversed the District Court's decision. *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F. 3d 1088 (13th. Cir. 2020). A divided court ruled the Maumee Nation's claim to the Topanga Cession had been abrogated by the Treaty with the Wendat of 1859. ("Treaty with the Wendat"). *Id.* at 10. However, the Court held the Wendat Reservation had kept its original boundaries. *Id.* Therefore, the Topanga Cession was within Indian country. *Id.* Moreover, the Court ruled that under the Indian law doctrines of preemption and infringement, New Dakota was prohibited from levying its tax on a tribal corporation. *Id.* at 11.

Currently, the Maumee Nation seeks relief from the Supreme Court. They are asking for this Court to reverse the Thirteenth Circuit's decision due to its errors in interpreting the ruling in *McGirt* and past Supreme Court precedent about Indian infringement and preemption.

STATEMENT OF FACTS

This case seeks to resolve two legal issues. First, whether the Topanga Cession is within Indian country, and if so, whether it is part of the Maumee Reservation or the Wendat Reservation. Second, whether the State of New Dakota can require a tribal corporation within the Topanga Cession to pay the TPT. Both the Maumee Indian Nation and the Wendat Band of Huron Indians ("Wendat Band") are federally recognized tribes. *Maumee Indian Nation*, 305 F. Supp. 3d at 4. Each tribe has between 1,500–2,000 members and lands within New Dakota. *Id.* The Treaty of Wauseon formed the Maumee Reservation. *Id.* 4-5. Congress ratified this Treaty in 1802. *Id.* The Treaty reserved the lands west of the Wapakoneta River to the Maumee Nation. *Id.* at 5.

In comparison, the Wendat Band signed the Treaty with the Wendat in 1859. *Id.* At the time of the Treaty with the Wendat, the Territory of New Dakota "was crying out for statehood." Cong. Globe, 35th Cong., 2nd Sess. 5411 (1859). Although, the "Maumee had been reduced in number[s] and were no longer [inhabiting] parts of the territory." *Id.* at 5412. During Congress' discussion of the treaty, Senator Solomon Foot mentioned how the Maumee Nation had "slowly yielded their claims to the bulk of the territory," and "the lands around Fort Crosby [were] becoming a center for commercial activity." *Id.* The Treaty with the Wendat designated the lands east of the Wapakoneta River to the Wendat Band. Today, the tribes share a border. *Maumee Indian Nation*, 305 F. Supp. 3d at 5.

After the passage of the General Allotment Act, Congress began to implement this change in Indian policy against both tribes. *Id. See* General Allotment Act, P.L. No. 49-105 (1887). The policy of allotment broke up Indian reservations and divided them among individual heads of households. Congress started the allotment process by authorizing the Secretary of Interior to survey both reservations. *See* Wendat Allotment Act, P.L. No. 52-8222 (1892); Maumee Allotment Act of 1908, P.L. No. 60-8107 (1908). For the Maumee Nation, individual allotments were to be dispersed to members of the tribe using the following plan: "160 acres for each head of household, 80 acres for each single adult, and 40 acres for each child under eighteen years of age." Maumee Allotment Act, P.L. No. 60-8107. In similarity, the Wendat Band tribal members were also able to pick 160 acres for themselves after the survey of their land was completed. Wendat Allotment Act, P.L. No. 52-8222.

The Maumee Allotment Act specified "the unclaimed lands in the western three-quarters of the reservation" would continue to be reserved for Maumee Nation. P.L. No. 60-8107. Furthermore, the statute stated how "the Indians [had] agreed to consider the entire eastern quarter surplus and to cede their interest in the surplus lands to the United States." *Id.* The language asserted how surplus lands "*may* be returned [to] the public domain by way of this act" *Id.* (emphasis added). In addition, the Act specified how the "lands shall be disposed of by proclamation…and [open] to settlement." *Id.* The statute did not give a specific amount the United States would pay for the land. Instead, the "law [provided] for the unconditional payment of any sum to the Indians." *Id.* The Maumee Nation would be paid "the price of said lands actually sold." *Id.* In total, the Maumee Nation received about $2,000,000 for about 400,000 acres of land. *Maumee* 305 F. Supp. 3d at 5.

The Wendat Allotment Act continued to reserve the "eastern half of the lands" within the 1859 Treaty to the Wendat Band. P.L. No. 52-8222. Additionally, "all lands not selected within one year of the survey's completion" were to be "declared surplus lands and open to settlement." *Id.* The United States agreed to pay the Wendat Band "three dollars and forty cents for every acre declared surplus." *Id.* However, the United States declared the Wendat Band would not be entitled to "more than two-million and two-thousand dollars," in total, for any surplus lands. *Id.* Lastly, the statute directed $40,000 to be paid to the Secretary of Interior to finish the survey and allotment process. *Id.* The Act specified a desire "to move the Indians unto their allotments as quickly as possible, and to open the surplus lands to settlement." *Id.* The Secretary of Interior believed opening the Wendat Reservation would allow "2,000,000 acres of valuable land [to be] added to the public domain." 23 Cong. Rec. 1777 (1892). The Wendat Band was paid "$2,200,000 for more than 650,000 acres of land." *Maumee Indian Nation*, 305 F. Supp. 3d at 5.

Before the allotment era, the Wapakoneta River moved about three miles to the west in the 1830s. *Id.* This shift created a piece of land within the Door Prairie County, which was both west of the Wapakoneta River in 1802 and east of the Wapakoneta River in 1859. *Id. See* Map at page 12. Both tribes have referred to the land as the Topanga Cession. *Id.* at 7. The parties agree the Topanga Cession was "declared surplus under one of the two allotment acts, although they disagree about which act." *Id.* The Maumee Nation did submit evidence showing the amount of money they received from lands sold during allotment from 1908 through 1934. *Id.* However, the Bureau of Indian Affairs (BIA) has no records of which exact parcels of lands the Maumee Nation were compensated for. *Id.* Very few members from each tribe live in the Topanga Cession, as seen in the demographic shift of Native Americans in the region. *Id.* at 7.

Although, the reservation status of the Topanga Cession is in dispute between the two tribes, on December 7, 2013, the Wendat Band purchased land in fee from non-Indian owners within the territory. *Id.* at 7. Then, on June 6, 2015, the Wendat Band announced their intention to use the land to construct a residential and commercial development owned by the Wendat Commercial Development Corporation ("WCDC"). *Id.* The WCDC is a Section 17 IRA Corporation fully owned by the Wendat Band. *Id.* 7-8. All the corporation's profits are sent to the Wendat tribal government as dividends. *Id.* at 8. The development, if constructed, would include "public housing units for low-income tribal members, a nursing care facility for elders, a tribal cultural center, a tribal museum, and a shopping complex." *Id.* The shopping complex would have a grocery store, a salon/spa, a bookstore, a pharmacy, and a café. *Id.* The WCDC estimated the complex would bring in about $80 million in gross sales annually and support at least 350 jobs. *Id.* Furthermore, the Wendat Band believed the complex, cultural center, and museum would attract non-Indian customers who could eat Wendat cuisine or buy Wendat traditional foods. *Id.*

Next, on November 4, 2015, the Maumee Nation contacted the Wendat Tribal Counsel and WCDC and expressed how they considered the Topanga Cession as part of their reservation. *Id.* Additionally, the Maumee Nation believed the shopping complex was obligated to pay the 3% Transaction Privilege Tax pursuant to 4 N.D.C. §212(5). *Id.* The TPT governs "gross proceeds of sales or gross income of more than $5,000 on transactions commended" in New Dakota. 4 N.D.C. §212(2). Moreover, §212(5) states "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 reservation" if they do not fall into the exception of §212(4). *Maumee Indian Nation*, 305 F. Supp. 3d at 6; s*ee* 4 N.D.C. §212(5). However, if the complex it not in Indian country, the

Maumee Nation would be entitled to 1.5% of the gross proceeds under §212(6). *Id. See* 4 N.D.C. §212(6). Currently, the Maumee Nation needs additional revenue. *Id.* The Tribe's timber harvesting has declined by 12% due to climate change. *Id.* On average, Maumee citizens have a 25% lower income than Wendat tribal members. *Id.* The tax would allow Maumee Nation to invest in other economic markets to help the Tribe create other jobs and services for its members. *Id.*

In response, the Wendat Tribal Counsel and WCDC stated the Topanga Cession was part of the Wendat Reservation. *Id.* They laid claim to the territory under their rights from the Treaty with the Wendat of 1859. *Id.* Additionally, the tribe claimed the Maumee Reservation had been diminished by the Maumee Allotment Act of 1908. *Id.* Therefore, the land reversed back to the Wendat Band. *Id.* Based on the Wendat Band's response, the Maumee Nation filed a complaint in federal court on November 18, 2015. *Id.* Lastly, this case was granted Writ of Certiorari on November 6, 2020.

SUMMARY OF ARGUMENT

ABROGATION & DIMINISHMENT

Under the U.S. Constitution, Congress has the plenary power to legislate in the field of Indian affairs. U.S. Const. art. I, §8, cl. 3. This legislative authority includes "'the power to modify or eliminate tribal rights.'" *Murphy v. Royal*, 875 F.3d 896, 918 (10th Cir. 2017) (quoting *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 343 (1998). Thus, the Supreme Court has held that only Congress "has the power to unilaterally abrogate treaties made with Indian Tribes." *Id.* at 917; *see Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1903). For courts to find that Congress abrogated an Indian treaty it must find a clearly expressed intent to do so. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *see United States v. Dion*, 476 U.S. 734, 740 (1999). Without clear intent from Congress, the Supreme Court will be hesitant to find Indian treaty rights as abrogated. *Dion*, 476 U.S. at 739.

Additionally, "only Congress can disestablish or diminish a reservation." *Murphy* 875 F.3d at 917; *see Lone Wolf*, 187 U.S. 533 (1903). The court in *Solem v. Bartlett*, created a three-factor test to analyze if Congress intended to diminish an Indian Reservation. 104 S. Ct. 1161 (1984). First, the Courts must examine the text of the statute of which effects the reservation. *Solem*, 104 S. Ct. at 1166. Second, the court is required to consider the "events surrounding the passage" of the statute. *Id.* Lastly, the court can analyze the "events that occurred after the passage" of the statute. *Id.*

In this case, the Treaty of Wauseon was not abrogated by the Treaty with the Wendat of 1859. Throughout the Treaty with the Wendat, Congress did not make explicit statements or comments to indicate that it considered abrogating the Maumee Nation's treaty rights. In addition, using the *Solem* test, the Maumee Reservation was never diminished. The Maumee

Allotment Act did not use any specific language which indicated Congress intended to diminish the reservation. Next, the legislative history does not support any findings of diminishment. Finally, the demographic changes within the Topanga Cession do show a loss of Indians within the region, but the Supreme Court has always upheld not solely relying on this evidence to prove diminishment. However, if this Court rules that the Topanga Cession is not within the Maumee Reservation the Court should find the Wendat Reservation was also diminished and the Topanga Cession is no longer in Indian country.

PREEMPTION & INFRINGEMENT

There are two doctrines that serve to prevent the extension of state power over tribes, the doctrine of preemption and infringement. "Either [barrier], standing alone, can be a sufficient basis for finding a state law inapplicable." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). To determine whether either barrier applies, courts must look to whether the involved parties include Indians or non-Indians and whether the action is taking place in or outside of the relevant tribe's Indian country. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

The doctrine of preemption prevents the extension of state law over tribal reservations and tribal members if "[state law] 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." *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1186 (10th Cir. 2011) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)). To determine when a state law interferes with or is incompatible with federal and tribal interests reflected in federal law, the Court must consider "relevant federal statutes and treaties … in light of the 'broad policies that underlie them and the notions of sovereignty that have developed from historical

traditions of tribal independence.'" *Ramah Navajo Sch. Bd. Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982) (quoting *Bracker*, 448 U.S. at 144-45).

When applied, the doctrine of infringement seeks to prevent state law from violating Indians' right "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 223 (1959). State law is generally inapplicable "[w]hen on-Indian country conduct … involving only Indians … is at issue[.]" *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012) [hereinafter "*Muscogee II*"] (citing *Bracker*, 448 U.S. at 144). However, when Indians act outside of their own Indian country, "including within the Indian country of another tribe, they are subject to non-discriminatory laws otherwise applicable to all citizens of the state." *Muscogee II*, 669 F.3d at 1172 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)).

In this case, the doctrine of preemption does not apply because there is no federal statutory or regulatory scheme, or treaty that recognizes the Wendat Band's right to sell goods through the WCDC. Further, the doctrine of infringement does not apply as the TPT is a non-discriminatory tax and the activity being taxed is taking place either within the boundaries of the Maumee Reservation or within Door Prairie County in New Dakota. Regardless of whether the Topanga Cession is part of the Maumee Reservation or within the Door Prairie County, the TPT applies either way as the WCDC is operating either within another tribe's Indian country or within land under the jurisdiction of the State of New Dakota.

This Court should reverse the Thirteenth Circuit's ruling and hold that the Topanga Cession is either part of the Maumee Reservation, which has not been diminished or abrogated, or rule it is outside of Indian country. Therefore, TPT can be applied on the WCDC because the state is not preempted from applying the TPT nor does it infringe on the Wendat Band.

ARGUMENT

I. The Maumee Nation's rights to the Topanga Cession were not abrogated by the Treaty with the Wendat of 1859. Second, the Maumee Reservation was not diminished by Congress under the Maumee Allotment Act.

The Indian Commerce Clause provides Congress with plenary power to legislate in the field of Indian affairs. U.S. Const. art. I, §8, cl. 3; *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). Using this power, Congress signed a treaty with the Maumee Nation in 1801. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. The Tribe agreed to reside within the New Dakota Territory, before it became a state. *Id*. The Treaty of Wauseon created a boundary line between the United States and the Maumee Nation. *Id.* The Maumee Reservation was given "the western bank of the river Wapakoneta, between Fort Crosby to the North and the Oyate Territory to the South, and [would] run westward" to the Sylvania river. *Id.* Later, the Wendat Band entered a treaty with the United States. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. The Treaty with the Wendat of 1859, also reserved space for the Wendat Band within the New Dakota Territory. *Id.* The boundary lines were "[e]ast of the Wapakoneta river; with the Oyate Territory forming the southern border, and the Zion tributary forming the northern born" *Id.* However, only Congress can abrogate a treaty. Without 'explicit statutory language' the Supreme Court has stated their reluctance to find abrogation of treaty rights. *Dion*, 476 U.S. at 739 (quoting *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979)).

Furthermore, the Supreme Court has held that "only Congress can diminish or disestablish" the boundaries of a reservation. *Murphy*, 875 F. 3d at 917. To analyze Congress' intent to diminish a reservation, the Court in *Solem*, created a three-factor test which courts must use to analyze if a reservation has been diminished. *See Solem*, 104 S. Ct. 1161 (1984). Both

tribes within this case were subject to the Indian policy of allotment. *See* Wendat Allotment Act, P.L. No. 52-8222; Maumee Allotment Act, P.L No. 60-8107. Yet, using the *Solem* test, the Maumee Reservation was never diminished by Congress. Therefore, the Maumee Nation should be remitted the gross proceeds of the WCDC shopping complex under 4 N.D.C. §212(5).

A. The Maumee Nation's rights were not repealed by the Treaty with the Wendat of 1859.

The relationship between the United States and Indian tribes has gone through many policy changes. Initially, "[f]rom 1789 to 1871" the United States made treaties with Indian tribes. S. Lyman Tyler, A History of Indian Policy at 12 (United States Department of the Interior Bureau of Indian Affairs 1973). The goal of treaties was to "recognize the rights of the Indian tribes to the lands" which they were living on. *Id.* at 49. However, as Americans started moving westward the relationship between western settlers and Indians came into greater conflict. The reservation policy, which began around the 1840s would "see the Indians placed on isolated islands entirely surrounded by other lands controlled by private landholders." *Id.* at 71. Eventually, the General Allotment Act of 1887 began the Indian policy of allotment. The Secretary of Interior "was authorized to purchase from the tribe's surplus lands not needed for individual Indians" and open them for outside settlement to non-Indians. *Id.* at 97. These policies were used to try and teach Indians the perceived benefits of "Christianity and [western] civilization." Cong. Globe, 35th Cong., 2nd Sess. 5412 (1859).

Although, Indian policy has fluctuated throughout U.S. history, "the power [] to abrogate the provision of an Indian treaty" has always existed with Congress. *Lone Wolf*, 187 U.S. at 556. However, Congress "must clearly express its intent to [abrogate a treaty]." *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202; *see Dion*, 476 U.S. at 738-40. Fundamentally, the Supreme Court has viewed "Indian treaty rights [as] too fundamental to be easily cast aside" by other

statutes or government interests. *Dion*, 476 U.S. at 739. When Congress does not show "a clear and plain intent," courts may look at other evidence. *Id.* Courts can examine the "'surrounding circumstances,' and the 'legislative history'" around the passage of a statute. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977) (quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)). Additionally, the Supreme Court held that it is important to have "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 the conflict by abrogating the treaty." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019) (quoting *Dion*, 476 U.S. at 740). If there is not any explicit legislative language, the Supreme Court "[has] been extremely reluctant to find congressional abrogation of treaty rights." *Dion*, 476 U.S. at 739 (quoting *Washington v. Washington Commercial Passenger Fishing* Vessel Assn., 443 U.S. 658, 690 (1979)).

For example, in *Herrera*, the Crow Tribe agreed with the United States that the tribe had a "'right to hunt on the unoccupied lands of the United States so long as game may be found thereon' and 'peace subsists…on the boarders of the hunting districts.'" 139 S. Ct. at 1691 (quoting Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), Art. IV, May 7, 1868, 15 Stat. 650). Later in 1890, Congress admitted Wyoming as a state. *Id.* at 1693. Although, in 2014, Clayvin Herrera, a member of the Crow Tribe, shot several bull elk without a state hunting license. *Id.* After being convicted for taking elk off-season and without a state hunting license, Mr. Herrera claimed his right to hunt was pursuant to the 1868 Treaty. *Id.* The Supreme Court found the Wyoming Statehood Act "[did] not show Congress intended to end the 1868 Treaty hunting rights." *Id.* at 1698. Additionally, the Court held Congress made no indication of the Indian treaty rights when it passed the Statehood Act. *Id.* Moreover, they found no evidence that Congress considered the rights of the Crow Tribe when it

granted Wyoming statehood. *Id. See Mille Lacs Band of Chippewa Indians,* 526 U.S. at 203; Wyoming Statehood Act, July 10, 1890, ch. 664, 26 Stat. 222.

In comparison, in *Dion*, the Sioux Tribe "[had] a treaty right to hunt bald and gold eagles within the Yankton Reservation for noncommercial purposes." 476 U.S. at 736*; see* Treaty with the Yancton Sioux, Apr. 19, 1858, 11 Stat. 743. Then, Congress passed the Bald Eagle Protection Act (Eagle Protection Act), which made it a federal crime to be in possession of a bald or golden eagle, dead or alive. *Id.* at 740. *See* 16 U.S.C. §668. The Supreme Court found, "[Congressional] intent to abrogate Indian treaty rights to hunt bald and golden eagles [was] strongly suggested on the face of the Eagle Protection Act." *Id.* at 740. Even more, "upon reading the legislative history as a whole, … Congress in 1962 believed it was abrogating the rights of Indians to take eagles." *Id.* at 743. Therefore, the Court believed "Congress had considered the special cultural and religious interest of Indians" and "balanced those needs against the conservation purposes of the statute." *Id.* In conclusion, the evidence was so "unmistakable and explicit" for the Supreme Court not to rule that the Eagle Protection Act had abrogated the Yankton's treaty rights. *Id.*

In this case, the Maumee Nation signed the Treaty of Wauseon with the United States in 1801. This began a relationship between the United States and the Maumee Tribe. The purpose of the Treaty was to create a boundary line between the two sovereigns. It allowed the Maumee Nation to lay claim to the lands west of the Wapakoneta River within the New Dakota territory. *See* Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. The lands were given to the Maumee for them "to live and to hunt on, and to such [continue to] live thereon." *Id.* Eventually, the Wendat Band was also given land within the New Dakota territory. *See* Treaty with the Wendat of 1859, March 26, 1859, 35 Stat. 7749. They were granted the land east of the Wapakoneta River. *Id.* During Congress' discussion of the Treaty with the Wendat, the legislators spoke of their deep

desire to turn the Territory of New Dakota into a state. Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). The Senators wanted western settlers to "establish and cultivate new lands" within the territory. *Id.* Additionally, the government wanted the Indians to embrace "the benefits of Christianity and civilization." *Id.* Later, the Maumee Allotment Act of 1908, began the process of allotment against the Maumee Nation. In comparison, the Wendat Band had already been subject to allotment under the Wendat Allotment Act in 1892. The Maumee Nation's history reflects it subjection to the changes in Indian policies that the United States carried out among Indian Tribes.

At the time of the Treaty with the Wendat, the Wapakoneta River had moved three miles west of its original place in 1802. This created the Topanga Cession, a segment of land east of the Wapakoneta River as of 1859. Even with the shift of the Wapakoneta River, the Treaty with the Wendat made no mention of the Wendat Band having any rights to the lands west of the Wapakoneta. In similarity to *Herrera,* the language of the Treaty with the Wendat made no mention of the Maumee Nation or provided evidence that Congress considered the rights of the Maumee Nation when it passed the Treaty. There was even no mention of the fact that the tribes would share a border. Instead, The Treaty with the Wendat primarily mentioned the United States' agreement to pay the Wendat Band. Moreover, the United States promised to pay the debts of the Tribe. If Congress intended to abrogate the Treaty of Wauseon it made no clear expression of its intent to do so.

In assessing the legislative history surrounding the passage of the Treaty, Senator Lazarus Powell of Kentucky, mentioned how few Wendat members were "found near the river of the Wapakoneta." Cong. Globe, 35th Cong., 2nd Session 5411 (1859). As the Wendat Band lands were being open to settlement, Congress' did not make any statements to show their intent to

open the Maumee Reservation. Senator Solomon Foot of Vermont was the only Senator to mention the Maumee Nation in the legislative history. *Id.* He spoke of how the Maumee Nation had slowly relinquished their claims to the bulk of the territory. *Id.* Yet, there was no other language to demonstrate the territory he was speaking about was specifically the Maumee Reservation. The opposing party may point to the fact that one Senator also spoke of the reduction of Maumee members and how they no longer inhabited parts of their territory. *Id.* This second use of the word territory could indicate the Maumee Reservation. Although, the Senators would be familiar with differences between the words territory and reservation to use them correctly within their speech, indicating the use of the word territory may have referred to the Maumee lands before their reservation boundaries were created. The legislative history shows the changing demographics within New Dakota and the desire of Congress to help westward expansion, but not of its intent to repeal the Treaty of Wauseon. In contrast to *Dion*, nothing in the legislative history reveals Congress' belief it was abrogating the rights of the Maumee Nation. Lastly, nothing in the legislative history indicates how Congress balanced the rights of the Wendat Band against the rights of the Maumee Nation. In conclusion, Congress did not show a clear or explicit desire to abrogate the Treaty of Wauseon.

B. Under the Solem factors, the Maumee Reservation was not diminished by Congress.

Only Congress can disestablish an Indian reservation. *Murphy*, 875 F. 3d at 917. In *Solem,* a three-part test was created by the Supreme Court to review Congress' intent. *See* 104 S. Ct. 1161 (1943). This test has been well-established. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078 (2016). When a piece of land "is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly" states their intent otherwise. *Id.*

To determine Congress' intent, the court must first look at statutory language. *Murphy v. Royal*, 875 F.3d at 929. According to *Parker*, this is the most important step. 136 S. Ct. at 1080. Secondly, courts are required to look at the "events surrounding the passage" of the statute. S*olem*, 136 S. Ct. at 1166. Any "mixed historical evidence relied upon by the parties cannot overcome the lack of clear textual signal that Congress intended to diminish the reservation." *Parker*, 136 S. Ct. at 1080. Lastly, courts can "take note of the contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends" of the lands after the passage of an act. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998). This can include, the "'treatment of the affected areas, particularly in the years immediately following the opening'" of the lands to non-Indian settlers. *Parker*, 136 S. Ct. at 1081 (quoting *Solem*, 465 U.S. at 471). However, the Supreme Court "has never relied solely" on this third factor to find diminishment. *Id.* When analyzing an inquiry, any ambiguities are resolved in favor of the Indians. *Hagen v. Utah*, 510 U.S. 339, 411 (1994).

The Supreme Court in *Parker* found Congress did not intend to diminish the Omaha Indian Reservation when it enacted the 1882 Act. 136 S. Ct. 1072. The Act "empowered the Secretary [of Interior] to survey and appraise the disputed lands, which then could be purchased in 160-acre tracts by nonmembers." *Parker* 136 S. Ct. at 1079; *See* 22 Stat. 341. Also, the Act said the lands would be open for settlement. *Id.* Although, the Omaha Tribe's profits would be based on how many nonmembers purchased a tract of land. *Id.* The Supreme Court held "the 1882 Act [fell] into another category of surplus land Acts." *Id*. These acts solely opened the reservation for non-Indian settlement but did not diminish the reservation. *Id.* at 1079-80. "The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened areas [have] lost [their] reservation status." *Rosebud Sioux Tribe*, 430 U.S. at 586-87.

Yet, in *Hagen* the Supreme Court found the Uintah Indian Reservation had been diminished "when it had been opened to non-Indian settlers." 510 U.S. at 401. In 1902, Congress passed an Act, which made "allotments out of the Uintah Reservation." *Id.* at 403; *see* 1902 Act, May 27, 1902, ch. 888, 32 Stat. 263. The allotments "were to be 80 acres for each head of a family and 40 acres for each other members of the Tribes." *Id.* at 403-04; *see* 1902 Act, May 27, 1902, 32 Stat. 263. All other unallotted lands within the reservation could be purchased for $1.25 per acre and would be restored to the public domain. *Hagen*, 510 U.S. at 404 (citing 32 Stat. 263). The restoration of the unallotted lands to the public domain meant the lands were open to sale or settlement. *Sioux Tribe v. United States*, 316 U.S. 317, 323 (1942). In contrast to *Solem*, the Sectary of Interior was not being asked to "sell and dispose" of unallotted reservation lands. *Hagen*, 510 U.S. at 413; *See Solem*, 104 S. Ct. at 1167-68. Instead, the unallotted lands within the Uintah Reservation were being restored to the public domain. *Id.* This "*operative* language of restoration [has] uniformly equated…[to] a congressional purpose to terminate reservation status." *Id.* (emphasis added). Furthermore, the recent decision in *McGirt* held that even though Indian reservations have been subject to allotment, "Congress [did] not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." 140 S. Ct. at 2464; *Also see Mattz*, 412 U.S. at 497.

The change in the "Indian character" of a reservation can prove diminishment. *Yankton*, 522 U.S. at 356-57. Again, the Supreme Court's decision in *McGirt* did not find the population change in Oklahoma provided evidence to show Congress' intent to diminish the Creek Reservation. The population numbers in *McGirt* showed the lands which were in dispute "[had] remained approximately 85% to 90% non-Indian." 140 S. Ct. at 2500. *See* Brief for Respondent at 43, *Murphy v. Royal*, 875 F.3d 896, 965 (10th Cir. 2017). Yet, even with the large population

of non-Indians within the boundaries of the Creek Reservation this Court was not persuaded. Thus, a major shift in a region's demographics cannot overrule statutory text.

In this instance, using the *Solem* factors the Maumee Reservation was not disestablished by Congress. First, a reservation was created for the Maumee Nation. The boundaries of the reservation are the "western bank of the river Wapakoneta, between Fort Crosby to the North and the Oyate Territory to the South," and westward from there to the Sylvania River. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. The United States reserved the land within these boundary lines to the Maumee since 1801. *Id*

To understand Congress' intention for the Maumee Reservation this Court must look at statutory language. In analyzing the Maumee Allotment Act of 1908, it reads any "unclaimed lands in the western-quarters of the reservation shall continue to be reserved to the Maumee." Maumee Allotment Act, P.L. No. 60-8107. Additionally, the text of the statute also states the tribe would "*consider* the entire eastern quarter surplus and to cede their interest in the surplus lands to the United States where it may be returned the public domain by way of this act." *Id.* (emphasis added) Also, the Secretary of Interior was given the power to survey the land and "permit the Indians to select their individual allotments." *Id.* The use of the words consider and may show it was possible, but not certain, that the Maumee Nation would relinquish their rights to the surplus lands. In similarity to the 1882 Act in *Parker*, the Secretary of the Interior was given the authority to survey and appraise the land. Specifically, a survey of the Maumee Reservation was to "[examine]…the lands by experts of the Geological Survey." *Id.* Also, in similarity to *Parker*, the Act specified the Indians would be "[provided an] unconditional payment of [] sum" for the "land actually sold," versus a single payment of money. *Id.* In the end, the Maumee Nation was paid about $2,000,000 for about 400,000 acres of land. As the

Supreme Court held in *Parker*, the Maumee Allotment Act opened the land to non-Indian settlement, but it did not diminish the reservation.

Secondly, the legislative history surrounding the passage of the Act supports the argument that Congress did not intend to diminish the Maumee Reservation. During the discussion of the Act, Mr. Stephens, the Representative of Texas, noted the "sale and disposal of the surplus lands" would be after allotment. 42 Cong. Rec. 2345 (1908). Nonetheless, Mr. Gaines, the Representative of Tennessee, said he "understood that all lands unsold [would] continue to belong to the Indians…[u]ntil there [was] payment." *Id.* at 2346. Opposing counsel may note that one of the Representatives stated that Maumee Nation had "a written agreement with them in regard to the disposal of [their] reservation." *Id.* at 2347. Yet, the Representative's following statements after this sentence point to this written agreement being a decision to give the Maumee members 160-acres per allotment. In contrast to *Hagen*, there was no discussion of any of the surplus land going back to the public domain. Although, the Representatives seem eager to open the land to western settlement, the order for how the federal government would carry out this relationship with the Maumee Tribe was: first surveying and allotting the land before any surplus would be sold.

Lastly, when it comes to the demographics of the Topanga Cession, the land in 1880 had a 98.3% population of American Indians. *Maumee Nation*, 305 F. Supp. 3d at 7. *See* Census Data. In the 1920's this number dropped to 20.3%. *Id.* The American Indian population dropped to its lowest in 1980. *Id.* In 2010, the number was about 17.9%. *Id.* Although, these are interesting facts about the changing demographics within the Topanga Cession, they should still not weigh heavy in the court's analysis. In comparison to *McGirt*, the state of Oklahoma had more non-Indians in the region than the Topanga Cession had in 2010. Even though the region

had a vast majority of non-Indians this did not show help in finding that the reservation had been diminished. Further, as *Parker* held "subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation." 36 S. Ct. at 1082. In conclusion, the Topanga Cession is within the Maumee Reservation because the boundaries of the Maumee Reservation were never diminished by Congress, and any other available evidence does not overcome the lack of clear congressional intent.

II. In the alternative, the Topanga Cession is outside of Indian country because the Wendat Band's reservation was diminished during allotment, and the Topanga Cession is therefore part of Door Prairie County.

In the alternative, if the Court finds that the Maumee Reservation was diminished, then the Wendat Band cannot claim the Topanga Cession as part of their reservation because the Wendat Band Reservation was diminished by Congress in the Wendat Allotment Act. Therefore, the Topanga Cession is outside of Indian country. The same *Solem* factors applied to the Maumee Reservation will be used to analyze the Wendat Reservation.

The Treaty with the Wendat of 1859, established the Wendat Reservation. It laid out a space for the Wendat Band in the New Dakota Territory, "East of the Wapakoneta River; with the Oyate Territory forming the southern border and the Zion tributary forming the northern" end. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749.

In assessing the current state of the Wendat Band Reservation, this Court must start with the text of the Wendat Allotment Act of 1892. The Act set a timeline of one-year for Indian members to pick an allotment of 160 acres for themselves. The Act goes on to say, "all lands not selected within one year of the survey's completion shall be declared surplus land and open to settlement." *Id.* The only lands reserved for the Wendat Band under the Act were "the eastern half of the lands reserved by" the 1859 Treaty. *Id.* Thus, any lands to the west that the Wendat

Band laid claim to would no longer be within their reservation's boundary. So, even if this Court finds that the Topanga Cession was within the Wendat Reservation as of the 1859 Treaty, it was clearly designated as public domain and diminished under the Allotment Act. Furthermore, the United States agreed to pay the Wendat Band at most $2,200,000 for the surplus lands. In contrast to *Parker*, there was an individual sum of money agreed upon to give to the Wendat Band. Lastly, the Wendat Allotment Act ends with saying the government wanted to move the Indians onto their allotments as quickly as possible, and to open the surplus lands to settlement. Indeed, the government paid an additional $40,000 to speed up the survey process. This language clearly shows that Congress wanted to diminish the Wendat Band Reservation and open it up for settlement by non-Indians. Congress was even willing to pay extra money to ensure the Wendat Band were moved onto their individual allotments sooner.

Next, this Court should review the legislative history of the Act. During the House of Representatives consideration of the Act, the Clerk began the discussion by reading a message from the Secretary of Interior about the Act. The message stated the opening of the Wendat Band Reservation would provide "2,000,000 acres of valuable land" to the public domain. 23 Cong. Rec. 1777 (1892). As stated in *Hagen*, the public domain proves Congress' intent to diminish the reservation. Moreover, Representative Harvey "[anticipated] the opening of these lands" to the public, would result in settlers who had "congregated along the border in early fall" would now quickly go onto the lands in early spring. *Id.* Furthermore, Representative Harvey talked about how non-Indian settlers were coming to New Dakota from "Texas, Kansas, South *Dakota*" and other states to try and claim land. *Id.* The sense of urgency, which can be understood from the Representative's tone show how the United States was diminishing the Wendat Band Reservation to accommodate settlers coming into the Topanga Cession. Finally, the shifting

demographics of the Topanga Cession have already been discussed. The demographics show how there are many non-Indians living within the region. Although, this information can be used by this Court to assess if the Topanga Cession is in the Wendat Reservation, counsel acknowledges this Court usually gives little value to this type of evidence. In closing, if this Court finds the Topanga Cession is not a part of the Maumee Reservation, it should also find the land is outside the Wendat Band Reservation and not within Indian country.

III. The Transaction Privilege Tax ("TPT") is not preempted by Wendat Band law or Federal Indian Law, nor does the TPT infringe upon the Wendat Band, regardless of whether the Topanga Cession is or is not Indian country.

Neither the doctrine of preemption nor the doctrine of infringement prevents the State of New Dakota from applying the TPT on the Wendat Band's WCDC within the Topanga Cession. This is true whether the court holds that the Topanga Cession is Indian country as part of the Maumee Reservation, or whether the court holds that the Topanga Cession is not part of Indian country and is instead part of Door Prairie County.

There are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and [their] members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). "First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them." *Id*. "Either barrier, standing alone, can be a sufficient basis for finding a state law inapplicable." *Bracker*, 448 U.S. at 143. Application of the preemption and infringement barriers depends on the factors of "who"—Indians or non-Indians—and "where"—in or outside the tribe's Indian country. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

The finding of either doctrine of preemption or infringement as applicable in this case would bar the application of the TPT; however, neither applies. The doctrine of preemption does not prevent the application of the TPT because there is no treaty or federal statutory or regulatory scheme that preempts its application. The doctrine of infringement does not apply because the TPT is a generally applicable tax, and although its incidence falls on a Wendat Band enterprise, it does so off-reservation for the Wendat Band as the Topanga Cession is either part of the Maumee Reservation or part of Door Prairie County. Therefore, the Court should reverse the Thirteenth Circuit's holding and recognize the right of the State of New Dakota to impose the TPT on the Wendat Band's tribal corporation.

A. The doctrine of preemption does not prevent the State of New Dakota from applying the TPT on the Wendat Band's tribal enterprises.

Whether the doctrine of preemption prevents the State of New Dakota from applying the TPT depends on whether the imposition of the tax is preempted based on the tribal, state, and federal interests at stake. Courts should not apply a traditional preemption analysis to determine whether federal law preempts state law as applied to "tribal reservations and [tribal] members." *Bracker*, 448 U.S. at 142-43. To determine whether preemption bars the application of a state law to an Indian reservation or its tribal members, a court must conduct a "particularized inquiry into the nature of the state, federal, and tribal interests at stake" and balance those interests under the "backdrop" of Indian sovereignty." *Id.* at 143-45. To properly consider the "backdrop" of Indian sovereignty, courts must examine "relevant federal statutes and treaties … in light of the 'broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence.'" *Ramah Navajo Sch. Bd. Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982) (quoting *Bracker*, 448 U.S. at 144-45). "Under this balancing test, '[s]tate jurisdiction is preempted by the operation of 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.'" *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1186 (10th Cir. 2011) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)).

Generally, the Court has found that state law is preempted when there is either through treaty or through federal statute and regulation a recognition of a tribe's right to a certain activity unimpeded by a state. For instance, in *Bracker*, the Court held that the state of Arizona was preempted from imposing a motor carrier license tax and an excise fuel tax on trucks operating within the White Mountain Apache Tribe's logging operation. *Bracker*, 448 U.S. at 138. The Court based its decision on the tribal logging program's approval and regulation by the Secretary of the Interior under acts of Congress. *Id.* at 145-48. The Court determined that the federal regulatory scheme "[was] so pervasive as to preclude the additional burdens sought to be imposed in this case." *Id*. at 148. Then, in *Washington State Department of Licensing v. Cougar Den, Inc.*, the Court held the treaty language guaranteeing members of the Yakama Nation the right to travel upon all public highways in common with citizens of the United States preempted a state fuel tax from being imposed on a fuel importer owned by a member of the Yakama Nation. *Washington State Department of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1006 (2019). The Court based its reasoning largely on the language and history of the Yakama Nation's treaty with the United States such as the phrase "in common with" to refer to travel on public highways and the historical record demonstrating that this included travel for selling or distributing goods. *Id*. 1012-13.

Unlike in *Bracker* or *Cougar Den*, the Wendat Band has failed to show any statutory, regulatory, or treaty-based recognition of any right the tribe possesses to sell goods through the

WCDC without paying the TPT. There is no statute or regulatory scheme alluded to by the Wendat Band that indicates congressional intent to preempt state taxation. In *Bracker*, acts of Congress empowered the Secretary of the Interior to regulate numerous aspects of the White Mountain Apache Tribe's logging operation. Here, there is no relevant act of Congress raised by the Wendat Band. Further, unlike in *Cougar Den*, the Treaty with the Wendat of 1859 makes no mention of a right to a tribal enterprise like the WCDC that would preempt the State of New Dakota from imposing the TPT. The only mention of 'goods' in the treaty is about the payment of goods by the United States to the Wendat for land already ceded or for land ceded in the future.

Therefore, where neither a treaty, nor acts of Congress, nor a regulatory scheme exist indicating any acknowledgement of a right to a tribal enterprise like the WCDC, the state of New Dakota is not preempted from applying the TPT to gross sales within the Topanga Cession whether it is part of the Maumee Reservation or is part of Door Prairie County.

B. The doctrine of infringement does not prevent the State of New Dakota from applying the TPT on the Wendat Band's tribal enterprises.

Whether the doctrine of infringement prevents the State of New Dakota from applying the TPT on the Wendat Band's tribal enterprises depends on whether it interferes with the ability of the Wendat Band to make and be ruled by its own laws by controlling or interfering with the on-reservation conduct of Wendat Band members.

Tribal power extends to "what is necessary to protect tribal self-government or to control internal relations." *Montana v. United States*, 450 U.S. 544 (1981). Thus, the question when dealing with the doctrine of Indian infringement is whether application of a state law to Indian reservations or its tribal members violates the Indians' right "to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. Specifically, "[w]hen on-Indian country conduct …

involving only Indians … is at issue, state law is generally inapplicable." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012) [hereinafter "*Muscogee II*"] (citing *Bracker*, 448 U.S. at 144). This rule is applicable only when the tax is being applied on conduct taking place on Indian country of the tribal members who will pay the tax. *Id*. Conversely, when Indians act outside of their own Indian country, "including within the Indian country of another tribe, they are subject to non-discriminatory state laws otherwise applicable to all citizens of the state." *Muscogee II*, 669 F.3d at 1172 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). Further, invalidation of a state law because it interferes with tribal sovereignty is not favored. *Rice v. Rehner*, 463 U.S. 713, 720 (1983).

The Court has consistently held that infringement is a bar to state law only when it imposes a burden on Indians within their own Indian country. In *Williams v. Lee*, the Court held that Arizona could not exercise jurisdiction over a civil claim made by a non-Indian against an Indian when the cause of action arose in Indian country. 358 U.S. 217, 223 (1959). The *Williams* Court based its decision on the right of tribal governments to "make their own laws and be ruled by them." *Id.* at 220. However, the Court has allowed taxes on non-Indians even if the activity is on-reservation and involves a tribal enterprise. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980) (holding that a Washington state tax on cigarettes sold on the Colville Indian Reservation to non-members did not infringe upon the Tribes). The Court stated that any economic impact that the state tax may have on Indian businesses, such as non-Indian consumers choosing to go off-reservation to purchase cigarettes, did not demonstrate that the tax infringed on the tribe. *Id.* at 161-62. Further, the Court has upheld generally applicable taxes in several instances so long as the tax is non-discriminatory, is on off-reservation conduct, and no federal law exists to the contrary. For example, in *Mescalero Apache*

Tribe v. Jones, the Court held that New Mexico could impose a gross receipts tax on a tribal ski resort that was operated by the tribe on off-reservation land. 411 U.S. 145, 149 (1973).

The TPT thus does not infringe on the Wendat Band because the incidence of the tax falling on the WCDC is not discriminatory and because the Topanga Cession is either part of the Maumee Reservation or part of Door Prairie County and is not part of the Wendat Reservation. Like in *Mescalero Apache Tribe v. Jones*, the TPT is on activity that is taking place off-reservation for the Wendat Band. Regardless of whether the land at issue part of the Maumee Reservation or Door Prairie County is, the TPT is not being imposed on the Wendat Band on their reservation. Therefore, unlike in *Williams* there is no infringement on the ability of the tribe to make its own laws and be ruled by them as the tax does not extend to any activity taking place on the Wendat Reservation. Further, the TPT is not discriminatory, as it is generally applicable to any person or licensee that receives more than $5,000 of gross proceeds of sales or gross income on transactions commenced in the state. Finally, even if the tax may impact the amount of net profit being made by the WCDC, the *Colville* Court soundly rejected the notion that the type of potential economic impact at-issue in *Colville* and here reached the level of significance to infringe upon the tribes.

The Court should therefore reverse the decision of the Thirteenth Circuit as to its finding that the TPT infringes upon the Wendat Band, as the tax is being applied outside of the Wendat Band's Indian country and is applicable to all businesses in the state.

CONCLUSION

Petitioner now requests that the Court reverse the Thirteenth Circuit's decision because the Topanga Cession either remains part of the Maumee Reservation or is part of Door Prairie County and not the Wendat Reservation, and that therefore the state of New Dakota can apply

the Transaction Privilege Tax on the Wendat Commercial Development Corporation as the tax is neither preempted nor does it infringe upon the Wendat Band or its members.