No. 20-1104

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 RESPONDENT

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

STATEMENT OF THE CASE

I. STATEMENT OF THE PROCEEDINGS

The Wendat Band of Huron Indians plan to build a commercial development on land purchased on what is referred to as the Topanga Cession with. R. at 7. The Wendat Band and the Maumee Indian Nation have been in dispute about the ownership of the Topanga Cession for over eighty-years. *Id*. Although the land was purchased in fee from non-Indian owners, the Topanga Cession has been within the Wendat Band Reservation boundaries since the Treaty with the Wendat, March 26, 1859, 35 Stat. 7749 [hereinafter Wendat Treaty]. This treaty, when read with the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) invalidates any of the Maumee Nations' previous claims to the land.

After discovering the Wendat Band's intentions with the land purchase, the Maumee Nation filed a complaint seeking a federal court Declaration that the development obtain a Transaction Privilege Tax ("TPT") license and be mandated to pay the tax for a non-member business operating within the Maumee Nation Reservation. R. at 8. The Maumee Nation argued that the Wendat Band lost their claim to the Topanga Cession when the 1892 Wendat Allotment Act diminished the Wendat Reservation. Wendat Allotment Act, P.L. 42-8222 (Jan. 14, 1892); R. at 8. The United States District Court for the District of New Dakota agreed with this argument, concluding that the Topanga Cession was within the Maumee Reservation and issued their requested Declaration. R. at 9.

The Wendat Band asserts that even if the Topanga Cession was within the Maumee Reservation after 1859, it was subsequently diminished by the Maumee Allotment Act of 1908, P.L. 60-1807 (May 29, 1908). R. at 8. Furthermore, the imposition of the tax by the

State of New Dakota is an infringement on tribal sovereignty under *Williams v. Lee*, 358 U.S. 217 (1959) and should be subject to Indian preemption under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). R. at 11.

The case was appealed to the United States Court of Appeals for the Thirteenth Circuit. After the Supreme Court decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) the Court of Appeals allowed both parties to submit supplemental briefs. R. at 10. The Court of Appeals disagreed with the District Court's reading of the Maumee Allotment Act, and held that when the Act was juxtaposed with the Treaty with the Wendat, it was clear that the Maumee Nation's claim to the Topanga Cession has been abrogated. Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908); R. at 10. Additionally, the Court of Appeals found that the Wendat Allotment Act lacked the sufficient cession language required to diminish the Wendat Reservation. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892); R. at 10. Accordingly, the Court of Appeals concluded that the Topanga Cession is located within Indian country on the Wendat Reservation.

While it was undisputed that the fee land purchased by the Wendat Tribe was not yet entered into trust, the Court of Appeals agreed with the Wendat Band's assertions that the State of New Dakota is still unable to impose the tax. R. at 11. Accordingly, the Court of Appeals reversed the District Court's decision and ordered that the previous Declaration be withdrawn. *Id*.

There are two issues presented to the Supreme Court on this matter: (1) Did the Treaty with the Wendat abrogate the Treaty of Wauseon and/or did the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) diminish the Maumee Reservation. If so, did the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) also diminish the Wendat Reservation

or is the Topanga Cession outside of Indian country; and (2) assuming the Topanga Cession is still in Indian country, does either the doctrine of Indian preemption or infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation.

II. STATEMENT OF THE FACTS

This appeal arises out of a dispute between the Maumee Indian Tribe and the Wendat Band of Huron Indians surrounding land known as the Topanga Cession, which the Maumee Nation has asserted is part of the Maumee Reservation. R. at 4. However, the Topanga Cession has been a part of the Wendat Reservation since 1859. Wendat Treaty, *supra.*

The Wendat Band and the Maumee Nation are both federally recognized tribes under 25 U.S.C. § 5129, and both were subject to allotment following passage of the General Allotment Act. Act Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388 (repealed 2000); R. at 4. The General Allotment Act of 1887 was a hallmark of the shift in Native American policy after a period of treaty making; the new policy sought to break up the communal lifestyle of Native Americans. Cohens Handbook of Federal Indian Law §1.04 (2019) [hereinafter Cohen]. This was accomplished through the system advertised as mutually beneficial by allowing Native Americans to gain ownership of individual plots of land while simultaneously opening up the land for purchase by non-Indians. *See DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist*., 420 U.S. 425, 432 (1975)("The General Allotment Act was enacted in an attempt to reconcile the Government's responsibility for the Indian's welfare with the desire of non-Indians to settle upon reservation lands.") This shift was tied into the expansionist mindset fueled by new technological advancements, leaving no real space for Native Americans to exist. Cohen, §1.04.

This policy shift resulted in Acts of Congress that 'allotted' land to the Native American's living on their reservations and 'surplus lands' opening up for purchase by non-Indians. Cohen, §1.04. Naturally many issues arose from this attempted distribution of land and breaking up of the Native American community.

In the 1830's, the Wapakoneta River, which served as the boundary dividing the Maumee land from the Wendat land, moved. R. at 5. Although the respective treaties of each tribe showed that the Maumee Nation had the land tract to the west of the Wapakoneta River and the Wendat Band had the land to the east, the change in position left a three mile stretch which has since been known as the Topanga Cession. *Id.* Without a formal decision regarding which reservation the Topanga Cession belonged to, both the Wendat Band and the Maumee Nation have since claimed the Topanga Cession as part of their respective reservations. *Id.* at 7.

On December 7, 2013, the Wendat Band purchased a 1400 acre tract of land located within the Topanga Cession. R. at 7. The land was purchased in fee from non-Indian owners. *Id.* On June 6, 2015, the Wendat Band announced their plans for the parcel of land – a combination residential-commercial development, including housing, culturally valuable services, and a shopping center owned by the Wendat Commercial Development Corporation (WCDC). R. at 8. The WCDC is a Section 17 Indian Reorganization Act (IRA), wholly owned by the Wendat Band, remitting 100% of corporate profits quarterly to the tribal government as dividend distributions. *Id.* At 7-8. The shopping complex would combine nutritional and cultural necessities, including a cafe serving traditional Wendat foods, a grocery store with both traditional and fresh foods and ingredients, intended to help prevent the area from becoming a food desert. *See* R. at 7-8. There would also be a salon and spa, a

bookstore, and a pharmacy included in the complex, eventually supporting a minimum of 350 jobs. The WCDC prospectus also suggests their shopping complex would earn over $80 million annually, the proceeds of which would be used to fund the residential elements of the development. *Id.* These include public housing units for low-income members of the Band and a nursing home facility for the elderly, which would otherwise be cost-prohibitive for the Band to construct. R. at 8. Finally, the development would feature a tribal cultural center and tribal museum, which along with the cafe are expected to be especially key for attracting non-Indian visitors and shoppers not living on the reservation. R. at 7-8. These highlights will help to boost revenue at the shopping center and development, while also providing local jobs and education opportunities for all visitors. R. at 8.

On November 4, 2015, representatives from the Maumee Nation informed the WCDC and the Wendat Tribal Council that the Maumee Nation considered the Topanga Cession part of its land, stating that any dispute regarding ownership was resolved when the 1892 allotment act diminished the Wendat Reservation. *Id.* Accordingly, the Maumee Nation representatives expressed the expectation that the WCDC's shopping complex would pay the State of New Dakota the 3% Transaction Privilege Tax (TPT) as required by 4 N.D.C. §212. *Id.*

The WCDC and Wendat Tribal Council clarified that the Topanga Cession was in fact part of the Wendat Reservation, and had been since the 1859 Wendat Treaty. *Id.* Even if that had not rendered the Topanga Cession part of the Wendat Reservation, the Allotment Act of 1908 diminished the Maumee Reservation such that the Topanga Cession would have reverted back to Wendat land, pursuant to the Wendat Treaty of 1859. *Id.*

Although the land purchased by the Wendat Band in the Topanga Cession is not in trust and therefore not automatically exempted from the TPT, under 4 N.D.C. §212(4) the state's authority to collect the tax is both preempted by federal law, and barred by the doctrine of infringement. Therefore, the WCDC shopping center should not be subject to the TPT. R. at 10-11.

SUMMARY OF THE ARGUMENT

American Indian policy has a complex and diverse history; this complexity is a direct result of ever-fluctuating Federal-Indian relations. Cohen, §1.01. Due to this fairly inconsistent history of policy, regulation, and programs for Native Americans, the court precedent for Federal Indian law issues has few areas of stable footing. Cohen, §1.01. Stability is found in the principle that federal treaties and statutes are the "supreme law of the land" under the United States Constitution. Art. I, §8 Art. I, §8; Art. VI, cl. 2. As related to the present issue before this Court, this assures that Congress is authorized to regulate commerce with Native Americans. *McGirt,* 140 S. Ct. at 2462. These land claims determine the exercise of state, tribal, or federal jurisdiction for the application of taxation, and other civil and criminal acts, which occur on Indian country. Accordingly, this case holds important implications for the determination of traditional land claims that overlap between Native American tribes in the United States.

In the determination of the status of the reservation land, the Topanga Cession, the Petitioners, the Maumee Nation, rely on two assertions, first that the Treaty with the Wendat did not intend to abrogate the Treaty of Wauseon. *See* Wendat Treaty, *supra.*; Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404 [hereinafter Wauseon Treaty]. Second, that this Court read the 1892 Wendat Allotment Act to have unambiguously intended to have diminished the

Wendat Band Reservation. R. at 8. Neither of these assertions can be fully supported by the language on the face of the Wendat Treaty or the Wendat Allotment Act.

The Supreme Court has upheld a "well settled" approach to determining the status of reservation land. *McGirt,* 140 S. Ct. at 2482 (Roberts, J. dissenting); *Nebraska v. Parker*, 136 S. Ct. 1072, 1078 (2016). The finding that a reservation is diminished in any way requires an analysis to determine what Congress intended to accomplish through the Act. This Court narrowed that scope of that analysis in the *McGirt* decision. 140 S. Ct. at 2482 (Roberts, J. dissenting). This narrowing of the analysis does not change the intended purpose of the analysis; namely looking at the relevant law and interpreting its meaning. *See McGirt*, 140 S. Ct. at 2462; *Nebraska*, 136 S. Ct. at 1079. *McGirt* clarified that in the absence of the intent of congress to diminish a reservation, the other factors that this Court has previously given an increasing weight of influence, will not be sufficient to establish that a reservation was in fact, diminished. 140 S. Ct. at 2468-70. This clarification does not conflict with the governing principle that only Congress has the authority to diminish a reservation. *McGirt,* 140 S. Ct. at 2468; *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

In application, the Maumee Allotment Act clearly diminished the Maumee Reservation, extinguishing any Maumee Nation claims to the Topanga Cession. In juxtaposition, the Wendat Allotment Act does not contain the language that would allow the court to determine that there was an intention to cede the surplus lands to the United States, thus dispossessing the Wendat Band of their claim to the land.

Assuming the Topanga Cession is still in Indian country, the Court should find that the state of New Dakota is barred from levying the TPT against the WCDC shopping complex under both the preemption doctrine and the infringement test. *See Williams*, 358

U.S. at 220. Indian preemption is analyzed under the backdrop of congressional respect for the notions of sovereignty that developed from historical traditions of tribal independence, and presumes that state jurisdiction does not broadly apply in Indian country. 25 U.S.C. § 5108.[1] Although Congress can specifically and expressly create exceptions to the presumption, assessing whether or not state authority is preempted is more recently based on an implied analysis, in which "a particularized inquiry into the nature of the state, federal, and tribal interests at stake in the claim" is invoked in order to assess whether or not the congressional intent behind federal laws or programs relating to Indians would be impaired by the application of state law. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-83 (1976); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973); *Williams*, at 223.

The court should also find that the imposition of the state of New Dakota's TPT infringes on the right of Wendat Band reservation Indians to make their own laws and be ruled by them. *See Williams*, 358 U.S. at 223. The tax would be paid from the WCDC, which as a company under Article 17 of the IRA which remits 100% of profits to the tribal government, R. at 7-8, equates to state action directed at tribal governments and is invalid under the infringement test. *Whitehead* at 142; *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976).

[1] Under 25 U.S.C. § 5108, the federal government sets land aside for Indian tribes, and explicitly provides that such lands are "exempt from state and local taxation."

ARGUMENT

I. THE TREATY WITH THE WENDAT ABROGATED THE TREATY OF WAUSEON AND THE MAUMEE ALLOTMENT ACT OF 1908 DIMINISHED THE MAUMEE RESERVATION WHEREAS THE 1892 WENDAT ALLOTMENT ACT DID NOT DIMINISH THE WENDAT RESERVATION THEREFORE THE TOPANGA CESSION IS INDIAN COUNTRY WITHIN THE WENDAT RESERVATION

It is established precedent that only Congress can diminish the boundaries of a reservation. *See McGirt,* 140 S. Ct. at 2462; *Nebraska*, 136 S. Ct. at 1078-79; *Solem*, 465 U.S. at 470; *United States v. Celestine*, 215 U.S. 278, 285[2] (1909). The United States government has historically maintained a role of guardianship[3] over Indians. *See Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 354 (1962); *see also Lone Wolf v. Hitchcock,* 187 U.S. 553, 567 (1903); *See also Cherokee Nation v. State of Ga.,* 30 U.S. 1, 2 (1831). Because of this perceived relationship, there is a presumption[4] in favor of the existence of a reservation. *See Hagen v. Utah*, 510 U.S. 399, 440 (1994) *see also Solem*, 465 U.S. at 470; *DeCoteau,* 420 U.S. at 444. The result is the general rule mandating that the court resolve any unclear interpretations of the Acts' of Congress in favor of Indians. *See Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 586 (1977).

In spite of this presumption, Congress has feigned to expressly diminish a reservation at times in the past. One recognized way to accomplish this is through an "express congressional purpose to diminish" established by the language in the relevant statute. *Solem*, 465 U.S. at 475. The language that the court looks for is a "specific reference to the cession

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[2] "When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."
[3] "They may more correctly perhaps be denominated domestic dependent nations… Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."
[4] "We are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and the reservation boundaries survived the opening."

of Indian interests in the opened lands or any change in existing reservation boundaries." *Id*. at 474. When this language is reenforced with an unconditional commitment to compensate the Indian tribe for its land opened for settling, it is nearly impossible for a tribe to contend that Congress did not intend to diminish the reservation. *Id.* at 470. The alternative language recognized by this Court that results in diminished reservation boundaries is when tribal lands are restored to the public domain, they are considered to be "stripped of reservation status." *Hagen*, 510 U.S. at 412-13. This designation is taken from the understanding that restoration to the public domain signaled that the land's prior use was "extinguished." *Id*. Whatever form the intent takes, there needs to be a finding that Congress had the explicit intention to change the boundaries of the reservation lands. *See Solem*, 465 U.S. at 1166; *Rosebud*, 430 U.S. at 1378.

In response to a multitude of issues involving the status of reservation land, or previous reservation land, this Court established an analysis for determining the effect of an Act of Congress on reservation boundaries involving surplus land. *See Solem*, 465 U.S. at 468-71. Three factors came out of *Solem* for consideration by the court to determine if Congress intended for an act to diminish the size of the reservation. *Id*. The most probative evidence of diminishment is the actual language of the governing act of Congress. *McGirt*, 140 S. Ct. at 2462; *Nebraska*, 136 S. Ct. at 1079; *Hagen*, 510 U.S. at 959. The *McGirt* decision sought to reign in some of the liberties taken by Oklahoma's reading of the Court's decision in *Solem*. *McGirt*, 140 S. Ct. at 2468-70.

The Supreme Court has previously relied heavily on "extratextual sources" such as the subsequent treatment of the opened lands. *McGirt*, 140 S. Ct. at 2469. However, in *McGirt* the Court asserted that while they may be supportive, these extratextual sources are

not an alternative means of proving disestablishment or diminishment. *Id.* There, Oklahoma argued that disestablishment was proven by the historical practices and demographics surrounding the laws passed by Congress, despite a complete lack of evidence that Congress actually intended to dissolve or disestablish the Creek Nation reservation through those laws. *Id.* at 2465-68. Accordingly, this Court held that the other factors are to be used only as "interpretive evidence" to clear up any confusion in the operative language of the relevant statute, they are not a replacement for the explicit language of cession. *Id.* at 2469.

Instead of the three "steps" that Oklahoma proposed would lead to the diminishment of a reservation, *McGirt* served as the reminder to reset these as factors, with the explicit and unambiguous language of the relevant act as the foundation to prove the intent of Congress to diminish, and the other factors merely supportive evidence. *Id*. at 2469-70. This Court determined that if the relevant statute is not ambiguous and its meaning is clear than "there is no need to consult extratextual sources." *Id.* at 2469. Applying these factors to the status of the Topanga Cession, the Court of Appeals correctly decided that the Maumee Reservation has been diminished and that the Wendat Reservation remained intact, resulting in the Topanga Cession being Indian country within the Wendat Reservation.

A. If the Court does not find that the Treaty of Wauseon was abrogated by the Treaty with Wendat, Topanga Cession still reverted back to Wendat Control after the Maumee Allotment Act of 1908 diminished the reservation

This Court has asserted that Congress has the additional authority to abrogate an Indian treaty unilaterally, even if the tribe's consent is not present. *See Rosebud*, 430 U.S. at 1364; *see also Lone Wolf*, 187 U.S. at 565-68. In *Lone Wolf* this Court relied on a previous holding of the Supreme Court that "full administrative power was possessed by Congress

over Indian tribal property." 187 U.S. at 568 (citing Cherokee Nation v. Hitchcock). Accordingly, Congress was authorized to follow through with an allotment act despite the tribe not giving the appropriate consent based on the provisions of their treaty. *See id.* at 566-68. This line of reasoning came directly out of the strain of thought that Indian tribes were dependent on the United States and the U.S. government could do as they saw fit to benefit them. *See Lone Wolf*, 187 U.S. at 567; *U.S. v. Kagama*, 118 U.S. 375, 384 (1886).

It is uncontested that Congress established the reservations of both tribes; the Maumee Nation Reservation in 1802 and the Wendat Band Reservation in 1859. The Treaty of Wauseon established the boundary lines between the United States and the Maumee Nation, namely beginning on the Western bank of the river Wapakoneta. Treaty of Wauseon, Art. III. The Treaty with the Wendat was ratified by Congress over fifty years later in 1859. This treaty established the boundary lines as beginning east, of the since moved, Wapakoneta River, which by this time included the Topanga Cession. Treaty with the Wendat, Art. I.

In Article II of the Treaty with the Wendat, there is a provision for two reservations made to the aforementioned cession of land, while reserving the land East of the Wapakoneta River for the Wendat Band. Absent from these reservations, and the rest of the treaty, is the mention of any conflict over the reservation boundaries. This serves as evidence in the signing of this treaty, that the Topanga Cession was included within the boundaries thus extinguishing any claims of the Maumee Nation. Moreover, if the Court does not deem this clear enough, the language in the Maumee Allotment Act of 1908 shows congressional intent to diminish the reservation thus reverting the Topanga Cession back to Wendat Control under the 1859 Wendat Treaty.

It is also to be noted that the legislative history of the Treaty with the Wendat supports the Wendat Band's claim to the land. At its consideration, Senator Solomon Foot of Vermont stated at multiple points that the Wendat were the last Indians to be yielding their claims to the land in the territory. Cong. Globe, 35th Cong., 2nd Sess. 5411, 5411 (1859). The Maumee Nation is explicitly mentioned to have "slowly yielded their claims to the bulk of the territory" and "have been reduced in number and no longer inhabit parts of their territory." Cong. Globe, 35th Cong., 2nd Sess. at 5412. These statements of the status of the land at the time of the Treaty with the Wendat is useful to clear up any uncertainty about the intent of the treaty setting its boundaries east of the Wapakoneta River.

The Court of Appeals correctly decided that the Maumee Reservation has been diminished. Applying the *Solem* analysis, clarified by the *McGirt* decision, this Court should read the Maumee Allotment Act to conclude that Congress had the intent to diminish the Maumee Reservation. This is accomplished based on the language of the treaty itself without having to clear up any ambiguities with the consideration of the legislative history or relevant demographics. Additionally, although the sum certain payment language is not present in the Act, this Court has determined through precedent that a sum certain is not necessary to show the intent to diminish a reservation. *See Hagen*, 510 U.S.at 411-12; *see also Rosebud*, 430 U.S. at 598.

1. *The operative language of the Maumee Allotment Act of 1908 explicitly cedes the Maumee Tribe's interest in the land and returned it to the public domain, which shows the intent of Congress to diminish the Maumee Reservation.*

This Court has repeatedly recognized that diminishment of a reservation is accomplished through congressional intent to do so through "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt*, 140

S. Ct. at 2463; *Solem*, 465 U.S. at 470. This intent is guided by the principle that Congress has the sole authority to divest a reservation of its land and diminish its boundaries. *Solem*, 465 U.S. at 470. The requisite congressional intent can also be achieved when lands are "restored to the public domain." *McGirt*, 140 S. Ct. at 2462; *Hagen*, 510 U.S. at 412; *Seymour*, 368 U.S. at 354. Here, the Maumee Allotment Act contains both explicit cession language and the language that intended the return of the reservation land to the public domain. Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908), §1.

In *DeCoteau* this Court determined that a 1891 Act, which was the ratification of an agreement negotiated in 1889 with the Sisseton-Wahpeton, was sufficient to express the cession and relinquishment of the tribes claim, right, title, and interest in the land. 420 U.S. at 445. There, the 1891 Act stated, "by article 1, the Indians *cede*, sell, relinquish, and convey to the United States all the unallotted land within the reservation remaining after the allotments and additional allotments … have been made." *Id.* at 437. In *DeCoteau,* this Court determined the operative language in the relevant treaty to be "clear expressions of tribal and congressional intent." *Id.* at 447. Here, the Maumee Indians "*ceded their interest* in the surplus lands to the United States". Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908), §1. Although, the claim, right, and title are unmentioned here, this language is similarly a unambiguous expression of congressional intent to diminish the Reservation.

This Court has consistently recognized that the restoration of previous reservation land to the public domain is evidence of diminishment. In *Seymour,* the Petitioner's a writ of habeas corpus claimed that the state could not exercise jurisdiction over him since he was a member of the Colville Indian tribe and the crime was committed on Indian country[5]. 368

[5] Indian country as defined in 18 U.S.C. s. 1151: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including

U.S. at 352. The Court examined the language of the Colville Act of 1892 as relevant for the determination of the reservation status and consequently the proper exercise of jurisdiction. *Id.* at 354. The Act expressly "vacated and restored to the public domain" the Northern half of the original Colville reservation, but the Southern half, where the petitioners crime was committed, was not given the same fate but rather it was, "still reserved by the Government for their (the Colville Indians) use and occupancy". *Id*. The Court concluded that this distinction diminished the Northern Half but left the Southern Half intact since there was no similar provision to restore the Southern Part to the public domain in the same manner. *See id.* at 355.

Hagen also addressed the issue of whether or not the State could exercise criminal jurisdiction over an Indian for a crime committed on Indian country. 510 U.S. at 399. In *Hagen,* this Court concluded that when previously reserved lands were "restored" to the public domain, that their previous use was "extinguished." *Id.* at 412; *Nebraska*, 136 S. Ct. at 1079. This was based on the precedent that distinguished[6] the public domain from Indian reservations. *Hagen*, 510 U.S. at 413. Here, section 1 of the Maumee Allotment Act states, "the Indians have agreed to consider the entire eastern quarter surplus and *to cede their interest* in the surplus lands to the United States where it may be *returned the public domain* by way of this act." (emphasis added). Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). This language further evidences that Congress clear intent for the Act to result in the diminishment of the Maumee Reservation.

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rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

[6] (emphasizing that lands ceded and returned back to the public domain are stripped of reservation status).

2. *The lack of a sum certain payment does not conflict with the conclusion that the Maumee Allotment Act shows the intent of Congress to diminish the Maumee Reservation.*

A sum certain payment to compensate an Indian tribe for the opened land is not required by the Court to demonstrate congressional intent to diminish. *See Hagen*, 510 U.S. at 411-12. In *Hagen*, this Court rejected the idea that diminishment required both explicit language of cession and an unconditional commitment from Congress to compensate the Indians. *Id.* at 412. The cession language is enough to prove congressional intent and the definite payment merely provides additional evidence. *Id*. In that decision the Court relied on *Rosebud*, where diminishment was found even in the absence of a provision in the applicable act that set a certain sum to be paid to the Indians. *See Hagen*, 510 U.S. at 412; see also *Rosebud*, 430 U.S. at 598.

B. The Wendat Allotment Act did not diminish the Wendat Reservation and the Topanga Cession is Indian country within the Wendat Reservation boundaries

There are surplus land acts that diminish and there are surplus land acts that do not. *See Solem*, 465 U.S. at 469. Here, the Court of Appeals correctly decided that the Wendat Allotment Act did not diminish the Wendat Reservation, leaving the Topanga Cession intact. The Wendat Allotment Act lacks the precise language allowing a determination that Congress intended to diminish the Wendat Reservation through the Act. *See DeCoteau*, 420 U.S. at 445. (finding that the language was sufficient to result in the diminishment of the reservation, "The Sisseton and Wahpeton bands hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands…") The finding confirms that the unambiguous intent of Congress is the governing principle to evince any cession of title or interest resulting in the diminishment of a reservation. *See*

Solem, 465 U.S. at 470. The opening up of reservation land through the provision of allotments for settlement is not enough to prove that Congress intended to diminish the reservation status. *Mattz v. Arnett,* 412 U.S. 481, 504 (1973). Additionally, even if the Court found the presence of language similar to a sum certain payment to the Wendat Band, this Court has rejected that on its own as sufficient evidence to show the intent of Congress.

1. *The operative language of the Act of 1892 does not explicitly cede interest in the land to the United States, it merely opens the unallotted land to settlement while the United States keeps it in trust*

This Court has consistently held that the allotment of land within reservation boundaries, whether to Indian or non-Indian's, is consistent with the reservation maintaining its status. *See McGirt*, 140 S. Ct. at 2464; *see also Mattz*, 412 U.S.at 497. The opening of reservation land to be settled by Indian and non-Indian alike does not implicate the intent of Congress to diminish the reservation. *e.g. McGirt*, 140 S. Ct. at 2464; *Nebraska*, 136 S. Ct. at 1079-80; *Mattz*, 412 U.S. at 504; *Seymour*, 368 U.S. at 356. This application of the law springs from the statutory definition of Indian country and judicial efforts to prevent confusion about "checkerboard jurisdiction." *Seymour*, 368 U.S. at 428.

In *Seymour,* the Court applied the definition of Indian country under 18 U.S.C. §1151[7] finding that the plain language of the statute did not allow the purchase of land by non-Indians within a reservation to result in the diminishment of the reservation. *See* 368 U.S. at 357-358. There were two relevant acts that dealt with the Colville Indian Reservation's Northern and Southern Halves; the Colville Act of 1892 which diminished the reservation and the 1906 Act that did not diminish the reservation. *Id.* at 354-55. The Colville

[7] 18 U.S.C. §1151 (a): "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent..."

Act of 1892 affirmed that the Southern Half was "still reserved by the Government for their (the Colville Indians) use and occupancy." *Id.* at 354. The subsequent 1906 Act resulted in the opening up of the unallotted land on the Southern half, for sale and disposition, which this Court held did not diminish the reservation. *See id*. at 355.

In this case, the Wendat Allotment Act contains similar language to surplus land being held in reserve, "the eastern half of the lands reserved by the Wendat Band in the 1859 Treaty shall continue to be held in trust by the United States for the use and benefit of the Band." Wendat Allotment Act, P.L. 42-8222 (Jan. 14, 1892), §1. This language reflects the Federal government's role to engage with the Indians in a way that benefits their development, but does not implicate a diminishment of the reservation's status. *See Seymour*, 368 U.S. at 356. Section 1 of the Wendat Allotment Act, P.L. 42-8222 (Jan. 14, 1892) also states, "all lands selected within one year of the survey's completion shall be declared surplus lands and open to settlement." This language evinces that these surplus lands fall into the category that "merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit." *Nebraska*, 136 S. Ct. at 1079. Accordingly, this Court has repeatedly affirmed that this type of opening of reservation lands does not equate to the reservation's diminishment. *See McGirt*, 140 S. Ct. at 2464; *see also Mattz*, 412 U.S.at 497; *see also Seymour,* 368 U.S. at 356.

2. *The Wendat Allotment Act establishes no sum certain payment for the unallotted land, it merely provides for uncertain future proceeds with a monetary cap on what the Wendat Band can receive for the land*

A provision for a sum certain payment is not a requirement that an allotment act had the intent to diminish a reservation but may support the contention. *See Hagen*, 510 U.S. at

411-12 (asserting that the court had previously found diminishment in Rosebud even when there was no provision of a sum certain to the Indians). In addition to lacking any cession language, the Wendat Allotment Act establishes no sum certain payment for the unallotted land in its provisions, instead it only assures uncertain future proceeds to be payed into the Treasury. Wendat Allotment Act, P.L. 42-8222 (Jan. 14, 1892),§2. As such, there is no language in the Wendat Allotment Act to satisfy an "unconditional commitment from Congress to compensate the Indian tribe for the opened land." *McGirt*, 140 S. Ct. at 2462; *Solem*, 465 U.S. at 470. Here, there are only indirect benefits dependent on uncertain future sales, with a cap on the potential proceeds. *See Seymour*, 368 U.S. at 427; *DeCoteau*, 420 U.S. at 1094-95.

Even if the payment of a sum certain was indicative of the congressional intent to diminish, there is no certainty in having a price for every acre of surplus land and a cap of how much money will be remitted to the Treasury in the tribes name. The only certainty is that the tribe will not get more than the two-million and two-hundred thousand dollars, they are not otherwise guaranteed a pre-determined sum. A similar uncertainty was found in *Mattz* where this Court held that the proceeds from the sale of the unallotted lands being held in trust for the Indians was an indirect benefit. 412 U.S. at 504. The Court has reiiterated that future unallotted land sales to settlers was not based on a certaint benefit. *See DeCoteau*, 420 U.S. at 448; *see also Seymour*, 368 U.S. at 355. (holding in *Seymour* that the 1906 Act of Congress "merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit.")

The Court of Appeals was correct in its determination that the Wendat Allotment Act did not contain any cession language. Placed in juxtaposition with the language in the

Maumee Allotment Act it is even clearer that the language in the Wendat Allotment Act neither contains cession language nor sufficient evidence that the tribe was clearly paid a sum certain. Absence of clear and unambiguous cession language does not allow the conclusion of a, "present and total surrender of all tribal interests … meant to divest from the reservation all unallotted opened lands." *Solem*, 465 U.S. at 470. Moreover, in the face of an uncertainty in the language of an Act, this Court consistently decides in favor of the Tribe and the conclusion that the reservation was not diminished. *See McGirt*, 140 S. Ct. at 2470; *Solem*, 465 U.S. at 472.

3. *If the Court finds the Wendat Allotment Act of 1892 to be unclear on its face, the Court may look to additional supportive evidence to clear up the ambiguities and to support the fact that Congress did not intend to diminish the Wendat Reservation*

McGirt set the precedent that it is only necessary to show that Congress intended to diminish a reservation in the language of the congressional act itself. *See* 140 S. Ct. at 2468-69. (finding that Oklahoma's attempt to use contemporaneous or later practices instead of the law passed by Congress was not permittable.) However, while the Court held that contemporaneous or later practices are not sufficient to show diminishment by themselves, they can be used to clear up any ambiguity. *Id*. Acts dealing with Indian reservation land are often unclear on the topic of the boundary lines. *See Solem*, at 466-68. Here, the legislative history and subsequent treatment of the land are relevant for helping "clear up" any uncertainties about the intentions of Congress. *McGirt*, 140 S. Ct. at 2469.

If this Court determines that the act of Congress is ambiguous, thus allowing for the use of extratextual support, the holding of *Lone Wolf* in 1903 is relevant. *See* 187 U.S. at 566 (holding that Congress has the power exists to abrogate the provisions of an Indian treaty unilaterally). Prior to this decision, the agreements, negotiations, and communications with

the tribe whose reservation land was being allotted was important to determine what the intentions of the resulting allotment act was. *See id.* at 564-565 ("decisions of this court, the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or as sometimes expressed, as sacred as the fee of the United States in the same lands.") Accordingly, in land agreements before *Lone Wolf*, extratextual evidence was influential in the determination of any dispute about the outcome of the land sale; whereas post-*Lone Wolf*, this type of evidence was rarely influential. *See Nebraska*, 136 S.Ct. footnote 1, at 1081. Since the Wendat Allotment Act was passed before the *Lone Wolf* decision, the circumstances of the land sale are more persuasive.

The legislative history surrounding the passage of the Wendat Allotment Act of 1892 helps clear up any confusion about what Congress intended to accomplish in the passing of the Act. The Wendat Allotment Act was not passed with the same level of time, effort, and care as the Maumee Allotment Act.[8] The Congressional record for the House shows that there was an urgency to open up the land in order to allow the non-Indian settlers to get their land before the start of the harvest season. Leg. Hist, at 1779. There was no language about the disposing of the reservation land that was found in the legislative history for the Maumee Allotment Act.[9] Upon these evidences, the Wendat Allotment Act clearly intended to open up the surplus lands to settlement and in no way was giving up the Wendat Band's interest in the land. WAA. §1.

[8] (leg. Hist. for Maumee Act, stating that "the matter to which this bill relates were thoroughly discussed at the council and the Indians were made to understand just what it was proposed to do. All the details were fully discussed." At 2345.)
[9] "After the surplus lands are disposed of…" at 2349.

II. THE WENDAT BAND OF HURON INDIANS SHOULD NOT BE SUBJECT TO THE TRANSACTION PRIVILEGE TAX BECAUSE THE TPT IS PREEMPTED BY BOTH THE ABSENCE OF CONGRESSIONAL STATEMENTS EXPLICITLY GRANTING THE STATE AUTHORITY AND THE NATURE OF FEDERAL ACTS AND PROGRAMS TO SAFEGUARD TRIBAL AUTONOMY.

A. Federal Preemption Presumes State Jurisdiction Invalid in Indian Country

Indian preemption is based on the "backdrop of traditional notions of sovereignty", meaning there is a general presumption that state law does not have authority in Indian country. *Worcester,* 31 U.S. 515, (1832); Cohen at §6.03**.** The precedent set by the Court in *Worcester* is one which "leav[es] Indians free from state jurisdiction and control" *Rice v. Olson*, 324 U.S. 786, 789 (1945). Accordingly, Indian country is automatically presumed to be free from state jurisdiction, unless there is specific congressional intent for the relevant state law to apply. Cohen at §6.03**.** In the case of explicit congressional intent to override this presumption, a state can have jurisdiction over Indian country. However, this form of assessing congressional intent is not the only way for states to overcome the presumed limitations on their authority. *See Williams*, 358 U.S. at 220**.** Implied preemption, a particularized inquiry to determine whether the exercise of state authority in a specific context would violate federal law, has come to rely on a balancing test of the federal, tribal, and state interests at stake. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). The exercise of state authority may be preempted either expressly or impliedly by federal law if and/or when the authority in question is attempting to regulate any Indian or non-Indian on Indian country. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 (1973). and *Ramah Navajo Sch. Bd., Inc. v. Bur. Of Revenue*, 458 U.S. 832, 836 (1982). Such state regulation is presumed to be inapplicable unless it is expressly allowed by an act of congress. In the instant case, this applies to the WCDC development, as it is 100% owned by

the Wendat Band, R. at 8, and Indian country includes both reservation land and non-reservation land. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993).[10]

B. Express Congressional Intent

While the explicit congressional delegation of authority to states over Indian country is not the only form of discerning whether or not state law is preempted, it is easy to distinguish as the clear intent to allow state jurisdiction is evident. One such example is the 1953 enacted Public Law 83-280, 83 P.L. 280, 67 Stat. 588, 83 Cong. Ch. 505**,** an act expressly empowering state jurisdiction in five states over enumerated criminal and civil matters.[11] The detail involved in congressional acts such as P.L. 280 is indicative of the extent to which congressional intent to override the presumption can and has been made manifest. §2, 67 Stat at 588-89. Therefore, when no such specific congressional acts apply, the presumption that state law is precluded in Indian country still stands. In the instant case, with no such congressional act, the state of New Dakota is preempted from taxing the Wendat Band and WCDC. This conclusion hinges on the absence of any further federal acts or statutes relating to the state of New Dakota, including but not limited to any acts similar to P.L. 280, or language in relevant federal statements specifically granting state authority to tax Indians in Indian country so much so as to comprise an express statement of congressional intent to override the presumption.

C. Implied Preemption Analysis

[10] "But our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in "Indian country." *Okla. Tax Comm'n v. Sac & Fox Nation* at 123.

[11] Alaska was later added to this. Cohen at §6.04.

In ascertaining whether Indian preemption applies in the absence of express congressional acts or statements, the Court weighs the nature of the tribal, federal, and state interests at play in the specific context. *See White Mountain Apache v. Bracker*. These interests are not weighed in a vacuum, but in light of the canons of construction, specifically, to liberally construe statutes "...in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).[12] These canons or guides that are used as a lens through which to analyze the relevant tribal, federal, and state interests serve as counterweights in order to ensure a just outcome in situations where historically justice has been lacking.[13] Like the initial step of the preemption analysis, the presumption of limited state authority is still present, which means that an otherwise "equally strong" interest may not necessarily outweigh federal and tribal interests or underlying congressional intent.

Federal interests are evaluated by seeing whether the regulation of the state would hinder or impede their purpose. *Ramah* at 838-45. The federal "interests" or goals behind the federal programs or policies do not need to be demonstrably hindered, as "… it is sufficient that Congress has dealt with the subject matter by enacting legislation or establishing a program or policy that *could be* affected by a state tax or regulation." (emphasis added) *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221 (1987).

[12] "…this Court in interpreting Indian treaties, to adopt the general rule that "doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *See McClanahan* at 174, quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).
[13] "…now aimed at preserving tribal integrity and the Indian land base -- since enactment at the turn of the century of the statutory provisions upon which the Court relies. These current and now longstanding federal policies weigh decisively against the Court's finding that Congress has intended the States to tax -- and, as in these cases, to foreclose upon -- Indian-held lands." (Justice. Blackmun - dissent) – *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 270-71 (1976) (Blackmun, H., dissenting.)

Federal and tribal interests are in keeping with the presumption of a limitation on state authority in Indian country, as both are geared toward tribal independence and sovereignty, see Cohen at §6.03, and although the interests of each are weighed, if all are legitimate, the presumption stands. A state may have a legitimate interest in regulating, but that does not outweigh a legitimate tribal interest in maintaining "traditional notions of sovereignty". Even a legitimate state interest which could hinder or impede federal goals and intent underlying congressional acts or statements is preempted from exerting authority over Indian country. *See Cabazon* at 221.

The relevant congressional intent can be discerned from several pieces of federal legislation. For example, the federal statute admitting Arizona into the union explicitly predicated the admission on the state's " 'forever disclaim[ing] all right and title to...all lands lying within said boundaries owned or held by *any Indian or Indian tribes,*'" (emphasis added). *See McClanahan* at 175. Arizona's disclaiming rights to **all** lands, owned or held by **any Indian or Indian tribes.** Such a clear indication of congressional intent to limit state authority over **any** Indian or Indian tribe owned or held lands is in line with the doctrine of Indian preemption preventing the state of New Dakota from taxing the WCDC commercial development project. Furthermore, the inclusion of such an unambiguous term in the prerequisites for a territory to be granted statehood suggests this was of some importance to Congress. In the instant case, the tax in question could similarly hinder or impede another key piece of congressional legislation, The Indian Reorganization Act : **use:now aimed at preserving tribal integrity and the Indian land base -- since [****38] enactment at the turn of the century of the statutory provisions upon which the Court relies. These current and '\now longstanding federal policies weigh decisively against the Court's finding that Congress has intended the States to tax -- and, as in these cases, to foreclose upon -- Indian-held lands. (Justice. Blackmun - dissent) – County of**

Yakima v. Confederated Tribes & Bands of Yakima Nation – implied preemption analysis // The present Act, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, was enacted in 1934 with various purposes in mind, the ones most relevant being, first, "to permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations," [*126] and second, "to establish a system of financial credit for Indians." S. Rep. No. 1080, 73d Cong., 2d Sess., 1. [p. 159 U.S.] – federal purposes???**

The intent and purpose of the Reorganization Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). See also S. Rep. No. 1080, 73d Cong., 2d Sess., 1 (1934). As Senator Wheeler, on the floor, put it: "This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians." 78 Cong. Rec. 11125.
Representative Howard explained that:
"The program of self-support and of business and civic experience in the management of their own affairs, combined with the program of education, will permit increasing numbers of Indians to enter the white world on a footing of equal competition." [**13] *Id.*, at 11732]**

III. IMPOSITION OF THE TPT ON THE WCDC UNLAWFULLY AND SIGNIFICANTLY INFRINGES ON THE WENDAT BAND OF HURON INDIANS' RIGHTS TO MAKE THEIR OWN LAWS AND BE RULED BY THEM.

A. Infringement Balancing Test

Under the second prong of *Williams*, the doctrine of infringement is analyzed similarly to the concept of implied Indian preemption – the effect of imposing state regulation over Indian country is evaluated in light of the respective interests of the tribal nation(s) in question and the federal government. However, infringement is its own barrier to a states taxation powers, as Justice Canby stated, "So stated, the rule would doubtless curb any attempt of the states to tax the sovereign functions of the tribes." R. at 11.

Although language of a balancing test has been used, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134; *Moe* at 480-83, it is imperative to again revisit the canons of construction and the backdrop of tribal sovereignty, which all

Indian law cases must be interpreted in connection with. Furthermore, judicial authority is higher than congressional power in creating and asserting(Indian policy**.** *See Lara.*Therefore, congressional intent should still control when the court finds itself evaluating the relative strengths of competing interests and authority. As stated in *United States v. Choctaw Nation,* "To hold otherwise would be practically to recognize an authority in the courts not only to reform or correct treaties, but to determine questions of mere policy in the treatment of the Indians which it is the function alone of the legislative branch of the Government to determine."

Even If The "Balancing" Test Of Colville Etc Is Applied, In Levying The TPT Against The WCDC The State Of New Dakota Would Still Be Unlawfully And Significantly Infringing Upon The Wendat Band's Right To Make Their Own Laws And Be Ruled By Them Because This Action Would Undermine Tribal Governance And Economic Independence.

The State interests are strongest where the taxpayers are using state provided services, while tribal interests are strongest where there are services that would otherwise fall to the state which are being provided by the tribe. *See Colville* at 177. In the instant case, the Wendat Band would be providing services such as low income housing, elder care facilities providing for the housing, day to day medical care, and social needs of senior citizens in the community. Additionally, the tribe would be providing cultural and historical education, helping to prevent the area from becoming a food desert, and supplying regular jobs, all of which are things that would likely otherwise be needs people would have to turn to the state to get met. The Wendat Band is providing services which are not only beneficial to tribal members but also to non-members and people who live off the reservation, but also to the state by alleviating the potential burden of having to provide even more such services itself.

Furthermore, as stated in *Colville*, the interests of the tribe are strongest when revenues are coming from value generated by tribal activities and this value and/or services are being provided to taxpayers, just as will be the case with the WCDC shopping center development.

1. *Under The Williams Test, No "Balancing" of Factors or Interests is Required Because the State of New Dakota's Legitimate Interest In Raising Revenue Via Taxation Would Undermine Tribal Governance And Economic Independence, and Therefore Infringes on the Wendat Band's Right to Make Their Own Laws And Be Ruled By Them.*

2.

The "balancing" test employed in some recent cases, *see Moe* at 480-83; *Colville* at 177, to assess whether a state's regulatory acts rise to the level of infringement or not creates unnecessary work for the Court. The language in *Williams,* the seminal case regarding the infringement doctrine, delineates the capacity for state jurisdiction over non-Indian property based in Indian country to interfere with tribal self-government. *Williams* at 220**.** This holds even more weight in our case, where the land in question has been purchased by the Wendat Band. If in an instance where the rule applied to non-Indian owned land still holds the potential for interference with tribal self-government interests, in the present case, where the tribal government holds more authority over tribal owned land, the enforcement of the TPT against the WCDC would clearly infringe upon the Wendat Band's right to make their own laws and be governed by them.

CONCLUSION

For the foregoing reasons, Respondents the Wendat Band of Huron Indians respectfully request that this Court affirm the decision of the United States Court of Appeals for the Thirteenth Circuit and hold that the Topanga Cession is part of the Wendat land, and therefore immune to the state of New Dakotas Transaction Privilege Tax on its development.

Respectfully Submitted,

Counsel for Respondents