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 T1033

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QUESTIONS PRESENTED

Abrogation or diminishment of tribal reservations can only be found where Congress expressly and clearly changes the boundaries either by the language of the statute or in the case of ambiguous language with consideration of surrounding factors. The language of the treaties clearly does not abrogate. However, the allotment acts' language is ambiguous, and the factors weigh in favor of the Maumee Reservation remaining undiminished placing the Topanga Cession within the Maumee Reservation. Is the Topanga Cession still within a reservation and Indian country today?

States exercising civil regulatory jurisdiction over reservation land must show a strong state interest when the regulated parties are Indians. The proposed development in the Topanga Cession will serve a larger community than just the Maumee Reservation, and the tax paying entity is a non-member entity. Is New Dakota prevented, by preemption or infringement of Tribal sovereignty, from collecting the state Transaction Privilege Tax from a Wendat entity operating on the Maumee Reservation?

STATEMENT OF THE CASE

A. Statement of the Proceedings

The District Court in *Maumee Indian Nation v. Wendat Band of Huron Indians* determined that the Maumee Reservation was not diminished. 305 F. Supp. 3d 44 (D. New Dak. 2018). It also determined that New Dakota was allowed to levy its Transaction Privilege Tax directly on a non-member tribal entity owned and operated by the Wendat Band. *Id.*

The Thirteenth Circuit, with a divided court, reversed the District Courts holding. *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020). Holding that the Maumee Reservation has been diminished and that the Wendat Reservation remains intact. *Id.* The court also concluded that the State of New Dakota was not permitted to levy its Transaction Privilege Tax on the Wendat Band owned and operated business. *Id.*

B. Statement of the Facts

The Wendat Band and Maumee Nation are located in New Dakota. R. at 4. According to the Treaty of Wauseon, the Maumee Reservation is located west of the Wapakoneta River as it was in 1802. R. at 12, 5. Around 1830 the Wapakoneta River moved west and created the area communally known as the Topanga Cession between the old riverbed and the new riverbed. R. at 5. The Tribes have stipulated that the issue of the Topanga Cession does not need to be considered under water law. R. at 5. The Topanga Cession exists in Door Prairie County, New Dakota. R. at 6. The ownership of the Topanga Cession has long been disputed by the Tribes. R. at 7.

In 1802, Congress ratified The Treaty of Wauseon with the Maumee Indian Nation. R. at 5, 17. In 1859, Congress ratified The Treaty with the Wendat of 1859 with the Wendat Band of Huron Indians. R. at 18. Neither treaty acknowledged the presence of other tribes in the area nor the movement of the Wapakoneta River. R. at 16-18. Both treaties establish

reservations for the tribes. R. at 16-18. The legislative history for the Wendat Band's Treaty only states that the Maumee Nation is in New Dakota and that the Maumee have been successful in the area, illustrating a goal for Tribal relations with the United States. R. at 29-30.

Both tribes were allotted, each having individualized allotment acts. R. at 13-15. The allotment acts neither acknowledge any movement of the Wapakoneta River nor that there was potential for a boundary conflict. R. at 13-15.

The Maumee Reservation Allotment Act reserved any unclaimed lands in the western three-quarters of the Reservation for the Tribe in trust. R. at 13. The Allotment Act stipulated that the eastern quarter would be sold, with the United States acting as trustee for the sale, with a disclaimer that the United States would not directly purchase the property. R. at 13-14. The United States surveyed the unallotted lands in order to open said land under Homesteading law. R. at 13. Lands in the Topanga Cession may have been sold by the United States; the records, which the United States "kept," were spoiled. R. at 7. Due to the lack of records, it is unclear which parcels were sold on behalf of the Maumee Nation. R. at 7.

The United States surveyed the Wendat Reservation prior to allotment. R. at 15. The United States purchased land that remained unallotted one year after the surveying for a fixed sum of three dollars and forty cents per acre. R. at 15. The total payment not to exceed two-millions and two-hundred-thousand dollars. R. at 15.

The Topanga Cession has a tribal population of approximately eighteen percent as of the 2010 census. R. at 7. Both tribes concede that the Tribal members who reside in the Topanga Cession were not allotted the land on which they reside. R. at 7. Contrastingly,

within the Maumee Reservation the Tribal population is approximately forty percent while the western half of the Wendat Reservation has a tribal population of nineteen percent. R. at 7.

In 2013 the Wendat Band purchased, in fee, real property in the amount of fourteen hundred acres from non-Indian owners in the Topanga Cession. R. at 7. This land has not been taken into trust and is considered Indian Fee Land. R. at 8. In 2015, the Band announced their intended purpose for the purchased property was to build a combined residential-commercial development. R. at 7. This development will include housing, intended for use by low-income tribal members, a nursing facility for elders, a tribal cultural center, a tribal museum, and a shopping complex. R. at 7. The Wendat Commercial Development Corporation will own and operate the entire complex. R. at 7. The shopping complex will include a grocery store as well as several other amenities intended to benefit not only the Wendat community but the non-Indian community and others in the area. R. at 8.

The Maumee Nation is currently suffering financial struggles and there is a significant and ongoing decline in their largest revenue source of sustainable timber harvesting. R. at 8. When the members of both nations are compared, the Wendat members have an income that is 25% higher on average than the income of the Maumee members. R. at 8.

The Topanga Cession's status is in question and requires resolution as a result of a New Dakota Transaction Privilege Tax ("TPT"). R. at 5. The TPT requires that any business in the state of New Dakota with a gross value of greater than five-thousand dollars is required to obtain a TPT license and pay a three percent tax to the State. R. at 5. The value of the tax

collected is three percent of the gross proceeds of sales conducted or gross income on transactions within the state of New Dakota. R. at 5. Tribes operating within their own reservations are not required to obtain a license or collect a tax. R. at 6. Taxes collected outside of Indian County but within Door Prairie County will have one-half the value remitted to the Maumee Nation. R. at 6.

SUMMARY OF ARGUMENT

The Thirteen Circuit was mistaken in its holding that the Topanga Cession is no longer within the Maumee Reservation and therefore no longer Indian country. In addition, the Thirteen Circuit was mistaken in its holding that New Dakota could not require a Transaction Privilege Tax from the Wendat Band in the Topanga Cession. The Court must reverse the Thirteenth Circuit's holding that the Maumee Indian Nation's Reservation was diminished and that the TPT collection is prohibited.

The Maumee are entitled to remand with instructions to find that the Maumee Reservation has not been diminished, that the Topanga Cession is still Maumee Indian country, and that the state of New Dakota is permitted to collect the Transaction Privilege Tax from the Wendat Band's business operating in the Topanga Cession.

Alternatively, the Maumee Nation is entitled to remand with instructions to find that both the Maumee and the Wendat Reservations have been diminished and that the Topanga Cession is no longer Indian country. The standard of review for a finding of diminishment or preemption is de novo.

ARGUMENT

I. Congress Did Not Abrogate The Treaty of Wauseon

A. Congress Did Not Expressly Abrogate The Treaty Of Wauseon

The Treaty with the Wendat, ratified by Congress in 1859, did not abrogate the Treaty of Wauseon, ratified by Congress in 1802. This Court has well established precedent that treaty abrogation requires "clear evidence" of Congress's intent must be shown. This Court has emphasized that an "[e]xplicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights." *United States v. Dion*, 476 U.S. 738, 739 (1986) (citing *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

This Court will not find treaty abrogation unless it is Congress's "intention to abrogate Indian treaty rights be clear and plain." *Dion*, 476 U.S. at 738. This issue arose in *United States v. Dion* where statutory language conflicted with the language of a treaty with a federally recognized Indian tribe. *Id.*. This Court stressed in *Dion* that "Indian treaty rights are too fundamental to be easily cast aside" and therefore, stated "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 739.

In the case at hand, the treaty terms that allegedly create a conflict are the use of a river to mark the boundary between the two reservations. The Treaty of Wauseon states that the eastern boundary of the Maumee Reservation "shall be the western bank of the river Wapakoneta." Treaty of Wauseon, art. III, Oct. 4, 1801, 7 Stat. 1404. In the Treaty with the Wendat, the treaty language states that the Wendat Reservation shall encompass "those lands

East of the Wapakoneta River" with the river representing the western boundary of the Wendat Reservation. Treaty with the Wendat, art. I, March 26, 1859, 35 Stat. 7749.

Simply by reading the two treaties, there is no outright conflict, one tribe reserves the land on the eastern side of the river and the other tribe reserves the land on the western side of the river. On their face, there is no evidence to show that there was an intended ambiguity or that Congress was aware that the river had shifted. Furthermore, the two tribes were not party to each other's treaties and would not have known to necessarily raise an argument with regards to this boundary issue. There is no clear conflict in the language of the two treaties, simply that they used a common landmark and said east and west of said landmark. This indicates Congress did not consider or realize there was a conflict in the terms of the two treaties. Therefore, the Treaty of Wauseon was not expressly abrogated by the ratification of the Treaty with the Wendat 1859.

B. Legislative History Does Not Support Abrogation

This Court has previously permitted introduction of evidence regarding the legislative history surrounding a conflict with treaty terms in certain circumstances. *Dion*, 476 U.S. at 739 (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977)). However, such evidence may only be introduced to resolve rather than to create an ambiguity or conflict. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020). Furthermore, in light of the decision in *McGirt v. Oklahoma*, the Court has made clear that it will only consider "contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment" and will not "favor contemporaneous or later practices *instead of* the laws Congress passed." *Id*. at 2468.

Considering the legislative history, Congress in no way intended to abrogate the Treaty of Wauseon. In the Congressional Record, Congress discusses the Maumee in their

debates before ratifying of the Treaty with the Wendat. Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). The Congressional Record mentions the river only to lament the lack of cession by the tribes in general. *Id*. The tone is clearly positive towards the Maumee and their then current relations with the United States and in no way indicates that Congress wished to adjust or change their treaty arrangements. *Id.*

The fact that the Wendat Band has had some tribal members live in and build businesses within the Topanga Cession is not enough to justify abrogation of the Treaty of Wauseon with the Maumee. Applying the standard outlined in *McGirt*, action taken after Congressional ratification and not before cannot be used as evidence of Congressional intent. In fact, it is likely that the Wendat Band were wrongly in the area that belonged to the Maumee Nation.

II. The Maumee Reservation Was Not Clearly Diminished

A. The Maumee Reservation Survived Allotment

Allotment does not disestablish a reservation; it simply results in individual ownership of what had once been communal trust land. *McGirt*, 140 S. Ct. at 2464. "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* at 2468 (citing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). Congress is the only portion of the federal government that can disestablish or diminish a reservation. *McGirt*, 140 S. Ct. at 2462; *Solem*, 465 U.S. at 470. Congress can disestablish or diminish a reservation via legislative acts, even if doing so breaches the tribes then existing treaty. *McGirt*, 140 S. Ct. at 2462.

Congress diminishes reservations when there is clear intent for the boundaries to change either from the Act on its face or from surrounding circumstances. *Rosebud Sioux Tribe*, 430 U.S. at 615. Clear intent for diminishment is strongly suggested when there is "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem*, 464 U.S. at 470-71. Extratextual sources, beyond the acts themselves, are only a necessary part of the consideration when there is ambiguity in the statutory terms. *McGirt*, 140 S. Ct. at 2469. When there is not "substantial and compelling evidence of Congressional intent to diminish then the diminishment did not occur and the old boundaries for the reservation stand." *Solem*, 464 U.S. at 472.

Congress allotted the Maumee Reservation was allotted in 1908. The Allotment Act resulted in some of the land being classified as surplus lands. Maumee Allotment Act, P.L. 60-8107 (May 29, 1908). In order to determine if the surplus lands are still Indian country it is necessary to determine Congress's intent. *Solem*, 464 U.S. at 470.

Looking first to the language of the Act passed by Congress, the Maumee Allotment Act contains the following language, "[t]he Indians have agreed to consider the entire eastern quarter surplus and to cede their interest in the surplus lands to the United States where it may be returned the public domain." P.L. 60-8107. However, this use of "cede" is the singular use of cession language in the Maumee Allotment Act creating ambiguity as to the intent of Congress. *Id.*. An example of Congress clearly stating the intent to cede an interest would be, "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part . . .remaining unallotted." *Rosebud Sioux Tribe*, 430 U.S. at 597. Where this language demonstrated clear intent for cession of the land to the United States, the Maumee Allotment Act is more ambiguous. This means that extratextual sources

are necessary to determine what Congress intended and what the operative language of the Maumee Allotment Act is. *McGirt*, 140 S. Ct. at 2469; *Rosebud Sioux Tribe,* 430 U.S. at 615.

When construing statutes, the benefit of ambiguity must go in favor of the tribes. *See County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992). The Maumee Nation ratified an agreement regarding allotment; however, Congress passed a modified alternative to the agreement. The Act ratified by Congress was not the agreement previously approved by the majority of the Maumee Nation. *See* 42 Cong. Rec. 2345 (May 29, 1908) (Statement of Pray). There is no additional language of cession in the Congressional Record. However, there is discussion of "opening" of "surplus" land for settlement. *Id.* There was also clarification that land, whose sale was not brokered by the United States, would continue to belong to the Maumee. *Id.* (Statement of Gaines).

When lands are made available in a reserved area, they can be purchased outright by the United States Government or the United States can act as a trustee and dispose of the land. *Rosebud Sioux Tribe*, 430 U.S. at 596. Lands returned to the public domain are frequently considered to have been "stripped of reservation status." *Hagen v. Utah*, 510 U.S. 399, 411 (1994). However, lands that are termed to have been "returned to the public domain" can also be determined to have simply been opened to non-Indian settlers, which would not strip the land in question of its status of Indian country. *Id*. at 412-13 (citing *Solem*, 465 U.S. at 472-74). Lands that were opened for sale and disposal under the supervision of the Secretary of the Interior also did not diminish the reservation but simply opened the reservation to settlement. *Hagen,* 510 U.S. at 413. Land can be considered part of the "public domain" without losing its reservation character. *Id.*. The lack of a sum certain payment does not mean that the reservation was not diminished, but the lack of a sum certain

does mean that there is not a presumption of diminishment. *Solem*, 464 U.S. at 470. It is necessary to isolate the operative language of the Act in order to determine the goals and meaning of Congress. *Hagen*, 510 U.S. at 413. In order to determine what language Congress wanted to control the Legislative history can be used. *See McGirt*, 140 S. Ct. 2469.

The Allotment Act specifically reserved portions of the Reservation for the Maumee, while the land not specifically reserved was opened for purchase and entry under homestead laws. P.L. 60-8107. The Maumee Allotment Act provides for opening of the surplus land to settlement and return to the public domain. *Id*. There is conflict between the meanings of the wording in the Allotment Act. In discussion of the passage of the Maumee Allotment Act the "surplus" lands are discussion in regard to opening the lands to settlement and that land that has not yet been sold remaining the tribes. *See 42* Cong. Rec. 2345.

The United States, acting as a trustee, managed the sale of the "opened." P.L. 60-8107. The Allotment Act did not provide for a sum certain to be paid for the Maumee, in fact it disclaimed a sum certain payment and stated that the land would be disposed of with "the Unites States. . .act[ing] as trustee." *Id*.

When functioning as trustee, the United States has lost access or possession to the records that determine which lands in the Topanga Cession from the Maumee Reservation were sold and for which the Maumee Nation received compensation. *Maumee Indian Nation,* 305 F. Supp. 3d at 46. Interpreting the combination of factors in favor of the Tribe, as a result of the ambiguity present, results in the land in the Topanga Cession being opened to non-Indian settlers but not being diminished from the Maumee Reservation as a whole. Especially when considering the language used when discussing the Maumee Allotment Act in

Congress and the fact that what lands, which were sold by the United States as trustee, no longer have records to determine the status of lands that were sold in the Topanga Cession.

B. The Wendat Reservation Was Presumptively Diminished

An "almost insurmountable presumption" is created when Congress uses terms of explicit cession alongside "unconditional commitments" to compensate the tribe for the lands. *Solem*, 464 U.S. at 470. There is no clear language of cession or ceding in the Wendat Allotment Act, but the ambiguous language of the act in combination with the legislative history illustrate that cession was the intent of Congress alongside the payment of a sum certain to the tribe in exchange for the land. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). Presence of such, in combination with the compensation of a sum certain, would create an almost irrefutable presumption of diminishment. *Solem*, 465 U.S. at 470. Absent the language of cession in the Act and clarity regarding Congress's intent the legislative history can be used to interpret the Act. *McGirt*, 140 S. Ct. at 2469.

The Wendat Allotment Act contains language of diminishment of the reservation. The lands not selected for allotment are directly categorized as "surplus" and are open to settlement. P.L. 52-8222. These "surplus" lands are distinguished from the lands that are explicitly reserved for the Tribe in trust in the eastern half of the reservation. *Id*. The United States surveyed the Wendat Reservation before the land was allotted so the United States would know the content of the land on the reservation. *See* 23 Cong. Rec, 1777 (Jan. 14, 1892). Once the land was surveyed Tribal members had one year to select an allotted portion within the Reservation, at which point the remainder would be purchased for a sum certain by the United States. P.L. 60-8107. The Eastern half of the then existing Wendat Reservation was explicitly reserved to the Wendat Band. *Id*.

All non-reserved and non-allotted lands were declared surplus and the Wendat Band was compensated in the Act with a sum certain of three dollars and forty cents per acre of surplus, with compensation not to exceed two-million and two-hundred thousand dollars. P.L. 52-8222. The Legislative background for the Wendat Allotment Act explicitly speaks in terms of reducing "larger Indian Reservations" and seeking the cession of lands. *See* 23 Cong. Rec. 1777. Additionally, the purchased lands are termed as being added to the public domain. *Id*. The Wendat Reservation was diminished to no longer include the Topanga Cession in the years after the 1892 Allotment Act when the surplus land was purchased.

Should the Court find that the Maumee and the Wendat Reservations were diminished, New Dakota's ability to exercise the taxation power and enforce the TPT would be permissible as the land would be non-Indian country.

III. States Can Regulate Non-Members In Indian Country

There are two interconnected but independent ways to prevent states from exercising control in Indian country, preemption and tribal sovereignty, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980)., when the State has not opted into Public Law 280. Public Law 280 grants the state jurisdiction over Indian reservations. 28 U.S.C.A. § 1360 (West); 18 U.S.C.A. § 1162 (West); 25 U.S.C.A. §§ 1321-26 (West). This is currently an opt-in statute, and at present only a handful of states are fully or partially Public Law 280 states. 28 U.S.C.A. § 1360; 18 U.S.C.A. § 1162; 25 U.S.C.A. §§ 1321-26. According to the record, there is nothing in the statutes or treaties that indicate New Dakota is a Public Law 280 state.

In all other states, the Court follows the definition Congress adopted in 18 U.S.C.A. § 1151 as the definition of "Indian country." Key to this case is the operative language of § 1151(a) which defines Indian country as: "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 rights-of-way running through the reservation." 18 U.S.C.A. § 1151(a) (West).

Because the Maumee Reservation has not been diminished, the Topanga Land Cession, as part of the reservation, is still Indian country per § 1151(a). Regardless of who holds title to the land, whether to an Indian or non-Indian, the land within the reservation boundaries retains the classification of Indian country. Therefore, despite the fact that the Wendat Band, or anybody else for that matter, owns land within the Maumee Reservation, the land retains its full legal character as Indian country.

A. State Taxation Does Not Infringe Tribal Sovereignty

This Court recognizes that the United States does not grant the Indian tribes their sovereignty. *Williams v. Lee*, 358 U.S. 217, 218 (1959). Rather, it is inherent to the tribes and recognized as a power since time immemorial. *Williams*, 358 U.S. at 218. Even so, Congress and this Court have codified boundaries for jurisdiction in order to recognize lanes of power between the sovereignty of the tribes and the sovereignty of the United States, illustrated in the *Oliphant* case line. *See generally Oliphant v. The Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Williams*, 358 U.S. 217; *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1972); *White Mountain Apache Tribe*, 448 U.S. at 136.

In general, the default rule is that the Tribe's inherent sovereignty does not extend to non-members "beyond what is necessary to protect tribal self-government or to control internal relations." *Montana*, 450 U.S. 544, 564. That being said, it is important to note that tribal "sovereignty is not conditioned on the assent of a nonmember" and how a non-member

behaves or views the tribe is not dispositive. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982).

Rather, the Court has established two exceptions where the State's sovereignty is limited by the Tribe, resulting in the Tribe having civil jurisdiction over non-members. *Montana*, 450 U.S. at 565-66. The exceptions are enumerated in *Montana*. *Id*. Presently, to cover all gaps in jurisdictions, this Court recognizes the *Montana I* exception and then incorporated the *Williams* test with the *Montana II* exception. *See Strate v. A-1 Contractors*. 520 U.S. 438 (1997).

Williams states that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams,* 358 U.S. at 220.

This Court held that a state may not impose jurisdiction on a tribe if either of the two exceptions are met. The first exception, *Montana I*, deals with consensual commercial relationships with non-members. Specifically, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribes or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565.

The second exception states: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

This standard was later incorporated into a combination was found in *Strate* after this Court realized the *Montana* test and the *Williams* test created a gap, which did not allow for

situations where both the state and the tribe were claiming an interest. *See Strate*, 520 U.S. at 445; *McClanahan*, 411 U.S. at 179. This test "was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." *McClanahan*, 411 U.S. at 179. The application of the *Montana* factors is demonstrated in the case *Strate,* 520 U.S. at 452. In that case, the plaintiff sued a non-member in a tribal court after a car accident that occurred on a state-maintained highway within a reservation. *Strate,* 520 U.S. at 443. The court there held that using a common highway did not constitute a consensual relationship, and, therefore, the *Montana I* exception did not apply. *Strate*, 520 U.S. at 457. In evaluating the second exception of the *Montana* rule held that a state maintaining jurisdiction over a commonly used area, such as the road, did not significantly threaten or impede the tribe's actions and ability to execute self-government. *Strate*, 520 U.S. at 459.

The situation in this case focuses on whether or not the state taxing a non-member entity within the boundaries of the Maumee Reservation infringes on the Maumee's inherent sovereignty. In this case, should a non-member entity choose to work with a tribe, they are subject to that tribe's civil jurisdiction. But, if this is not the case, then the state still has civil regulatory jurisdiction in the matter. The *Montana I* exception does not apply because the Wendat have not entered into a consensual commercial relationship with the Maumee. Rather, they bought the land within the Topanga Cession and announced their independent intentions to construct the WCDC. The *Montana II* exception also does not apply because taxing the Wendat Band does not infringe on the Maumee's self-government.

Furthermore, the *Williams* test does not apply to this case, and therefore the Tribe's sovereignty is not infringed. This case is distinguished from *McClanahan* because the state is

taxing a non-member entity within a different tribe's reservation. Furthermore, they are collecting the tax on an entity and not a tribal member's personal income.

New Dakota's actions do not fit within any of the specific exceptions and their actions do not infringe on the Maumee's inherent sovereign. These exceptions are not met because the state is taxing the WCDC which is a non-member entity within the boundaries of the Maumee Reservation. This action in no way hinders the Maumee's self-government, and actually helps them accomplish better independence by providing a tax revenue to Maumee Nation. Failure to consider Topanga Cession Indian country results in inherent state jurisdiction over taxation resulting in remittance of 1.5% of the take to the Maumee Nation under TPT statute.

B. State Taxation Is Not Preempted By Federal Law

If the state is neither preempted from legislative control nor infringing tribal sovereignty when exercising said control, then the exercise of jurisdiction is permissible. *See McClanahan*, 411 U.S. at 167. Congress has the power to preempt state law, *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citing *see Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000)), via three different forms of preemption. Express preemption occurs when Congress passes a statute that contains express language withdrawing state powers. *Arizona*, 567 U.S. at 399. Conflict preemption occurs when "compliance with both federal and state regulations is a physical impossibility." *Arizona*, 567 U.S. at 399. State law is conflict preempted when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Arizona*, 567 U.S. at 399 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The final means of federal preemption is field preemption, which is when the field in question is one that it is so full of

federal legislation that there is "no room for the States to supplement" the legislation. *Arizona*, 567 U.S. at 399. This form of preemption is more common in Indian Law as Congress legislates many aspects of Indian country.

When determining preemption in Indian country the traditional concept of "Indian sovereignty" is used as an interpretative lens to determine if the state has been preempted by federal law. *White Mountain Apache Tribe*, 448 U.S. at 143. This includes state interreference with "matters which the relevant treaty and statutes leave to the exclusive province of the Federal government." *McClanahan*, 411 U.S. at 165. In order to determine preemption, there must be an evaluation of the treaties and federal regulations that are applicable to the tribe and industry in question. *Id*.

The Treaty of Wauseon with the Maumee lays out the boundaries of the land reserved for the Tribe, as well as removing the protection of the United States from any non-Indian who attempts to settle within the boundaries of the reservation. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. The treaty also contains the temporally common language that gives the United States jurisdiction over Tribal members for a set of enumerated crimes and provides for the distribution of goods to the Tribe. *Id*. There is a lack of language providing control of the reservation to the tribe, excepting the permission for the Tribe to punish non-Indians who settle on the reservation. *Id*. Therefore, the lack of enumerated control and jurisdiction leaves room for the State to exercise jurisdiction over non-members on the Reservation.

It is necessary to balance state regulatory interests with the interests and autonomy of the Tribe. *See White Mountain Apache Tribe*, 448 U.S. at 143-44. When the conduct being regulated in on the reservation and involves only Indians then the tribal interest in self-government is very strong. *White Mountain Apache Tribe*, 448 U.S. at 144. However, when

non-member Indians are on a different tribe's reservation and are conducting activity that is subject to state regulation, the state may regulate said non-members on the reservation. *Montana*, 450 U.S. at 550.

No portion of the treaty language with the Maumee provides the tribe with control over non-Indians on the reservation, with an exception for those who attempt to settle prior to allotment. The customers to the proposed business would not fall within the widest and oldest grant of tribal control to the Maumee. Additionally, no portion of the Wendat treaty provided the tribe with control over non-Indians. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. Within the Maumee Reservation, the control of non-member actions is not preempted under federal law.

With a finding of the Topanga Cession as Maumee Reservation Indian country, the WCDC would be a non-member entity who is operating in Indian country that belongs to another tribe. The state has a regulatory interest in the development that the WCDC is building due to the fact that the purpose of the development is to serve more than just Indians on the reservation. The proposed content of the development includes public housing for tribal members who are low-income and a nursing care facility for tribal elders both of which presumably with serve only tribal members and give the Wendat Band an interest in the development. However, the development is in the Maumee Reservation, making the land Indian country, and making the Wendat corporation a non-member entity operating on another tribe's reservation land. In addition to the living facilities for Wendat Band members there will also be a tribal museum, a tribal cultural center, and a shopping complex. The development is located in the Topanga Cession, which has a population that is approximately eighty-two percent non-Indian. This means that non-Indians, who fall under state jurisdiction,

are likely going to make up a portion, if not a majority of the population that is consuming products from the development.

The federal government is not concerned about a state exercising jurisdiction over non-Indians on Indian country. *McClanahan*, 411 U.S. 166. When an industry in Indian country is extensively regulated it is likely that the state regulation will be preempted. *See White Mountain Apache Tribe*, 448 U.S. at 145. For example, timber harvesting in Indian country is highly regulated by the federal government. *Id*. There is also a federal policy of promoting economic growth on the reservations across the United States. *Id.* at 151. When determining the permissibility of state tax, the question of who will bear the burden of the tax is also a consideration. *Id.*

Importantly, the majority of the individuals in the area who will frequent the WCDC and who will be the revenue generating portion of the business will be either non-Indians or non-member Indians. The Wendat Band would be paying to the state a three percent tax on proceeds or gross income, the location being in the Maumee Reservation would result in the taxes being remitted to the Maumee. This operates to the benefit of the Maumee and avoids the concerns raised by the Court in *White Mountain Apache Tribe*.

The Maumee Indian Nation makes the majority of its income, currently, with sustainable timber harvesting. Should New Dakota suddenly decide to exercise some form of their regulatory authority that interfered with the timber industry, then it is likely that would be preempted. However, the business that is intended to be built in the Topanga Cession is not in a field that is traditionally used by tribes to produce revenue. The exercise of the taxation under the TPT does not work to the detriment or place a burden on the Maumee.

Even if the Wendat Band increases prices of the goods sold and amenities offered in order to avoid losing profit as a result of the tax, the Maumee will not make up the majority of patrons for the business. The population of the Topanga cession is mostly non-Indian, additionally the majority of the western half of the Wendat Reservation, where it abuts the Topanga Cession, is non-Indian. Meaning that even if an increase of price occurs to offset the tax, neither tribe will be substantially affected financially by the increase, as it is distributed.

The New Dakota TPT does not interfere with, contradict, or exist in the realm of broad federal legislation. As a result, it is not preempted, and it a permissible exercise of the State's civil regulatory jurisdiction.

CONCLUSION

Petitioner, Maumee Indian Nation, seeks remand with instruction to the Thirteen Circuit as to the non-diminishment of the Maumee Reservation and the ability of New Dakota to collect the Transaction Privilege Tax. Failure to maintain the boundaries of the Maumee Indian Nation works to the detriment of the Tribe's financial interests. Failure to acknowledge the Maumee's claim to the Topanga Cession and New Dakota's taxation power works to the detriment of both the Tribal and State interests. A finding of diminishment of the Maumee Reservation would indicate a diminishment of the Wendat Reservation as well, resulting in the Topanga Cession not being Indian country and therefore falling wholly with the state of New Dakota's taxation power.