**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 RESPONDENTS

Team # T1036

*Counsel for Respondents*

Oral Argument Requested

Date: January 4, 2021

## QUESTIONS PRESENTED

I. Whether the Treaty with the Wendat of 1859 abrogated the Maumee Nation's interest in the Topanga Cession when the 1859 treaty considered the conflict with treaty rights and resolved the conflict through abrogation, and whether the Wendat Allotment Act diminished the Band's reservation when the Act fails to clearly express an intent to diminish the reservation.

II. Whether New Dakota's Transaction Privilege Tax infringes upon tribal sovereignty of the Band when it places a legal incidence on the Band or was preempted by federal-tribal interest when the revenue generated was from on-reservation work.

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## STATEMENT OF THE PROCEEDINGS

This case arises from a dispute over reservations boundaries between the Maumee Nation ("Maumee Nation") and the Wendat Band of Huron Indians ("The Band"). The Topanga Cession is claimed by both nations as within their own reservation boundaries. In 2013, the Band purchased a 1,400 acre parcel located within the Topanga Cession from non-Indian owners. In 2015, the Band announced its plans to construct a residential-commercial development on the property.

Subsequent to the announcement, the Maumee Nation approached the Band requesting that the Band pay the state of New Dakota a 3.0% Transaction Privilege Tax that would be remitted to the Maumee Nation on the grounds that the project was located within the Maumee Nation's reservation. This case involves reservation diminishment and abrogation as well as taxation preemption and infringement.

## STATEMENT OF THE FACTS

In 1802, the Maumee Nation entered into the Treaty of Wauseon with the United States. R. at 4–5. The treaty established a set of boundaries for the Maumee Nation and codified Maumee Nation territory as those lands west of the Wapakoneta River. *Id.* In 1859, the Band signed a treaty with the United States government which also established a reservation and boundaries for the Band. *Id.* at 5. The treaty established the Band's claim to lands east of the Wapakoneta River. *Id.*

However, during the 1830s, the Wapakoneta River moved three miles to the West creating a sizable tract of land which was west of the Wapakoneta River at the time of the Maumee treaty and east of the Wapakoneta River at the time of the Treaty with the Wendat. *Id.* This disputed tract of land, known as the Topanga Cession, is at the center of the present

litigation between the Band and the Maumee. *Id.* Both tribes have claimed exclusive right to the Topanga Cession since at least 1937—resting their pronouncements on treaty language. *Id.*

As typical with many tribal nations during the late 19th and early 20th centuries, both the Maumee Nation and the Band were subject to allotment acts which created more uncertainty about tribal rights to the Topanga Cession. *Id.* In 1892, Congress passed the Wendat Allotment Act which divvied the Band's reservation into 160-acre parcel allotments and opened up the remaining surplus lands to white settlers while continuing to hold part of the reservation in trust for the benefit of the Band. *Id.* at 15. Sixteen years later, in 1908, Congress passed the Maumee allotment act which issued 160-acre parcel allotments to Maumee citizens. *Id.* at 13. In addition to the allotment, the Maumee act contained cessation language regarding the eastern quarter of the reservation which was returned to the United States to be sold in the public domain. *Id.* Such express language is absent in the Wendat Allotment Act. *Id.* at 15.

In the years following the allotment, both nations continued to dispute the ownership of the Topanga Cession, but ultimately tried to settle their differences peacefully because of their shared border. *Id.* at 7. The dispute began to boil over in 2013 when the Band purchased a 1,400-acre parcel of land in fee from non-Indian owners.[1] *Id.* The parcel, located in the Topanga Cession, is to be used to construct a residential-commercial development which will include public housing, nursing care units, a tribal cultural center, a tribal museum, and a shopping complex owned by the Wendat Commercial Development Corporation.[2] *Id.* at 7.

[1] The parcel is still Indian fee land and not held in trust by the government.
[2] The WCDC is wholly owned by the Band.

Estimates suggest that the project, once completed, will employ 350 individuals and earn more than $80 million in gross sales yearly. *Id.* at 8.

In order to capitalize on the estimated future profits, the Maumee Nation approached the Band on November 4, 2015 requesting that the Band pay the 3.0% Transaction Privilege Tax to the State of New Dakota—which would then remit the tax to the Maumee Nation. *Id.* The Band refused the Maumee Nation's request, and the Maumee Nation filed suit against the Band. *Id.*

## PROCEDURAL HISTORY

Petitioner, Maumee Nation, filed suit against the Band for declaratory relief that Congress disestablished the Band's reservation, and to enforce New Dakota's Transaction Privilege Tax ("TPT") on the Band's new commercial development within the Topanga Cession. R. at 4. Petitioner alleged that Congress had diminished part of the Band's Reservation within the Topanga Cession. Furthermore, the Maumee Nation argues that the Band should remit three percent of its gross proceeds in the Topanga Cession under New Dakota's TPT. *Id.*

In response to Petitioner's lawsuit, the Band asserted that the doctrines of infringement and preemption protect the Band from New Dakota's TPT. *Id*. at 4. Alternatively, the Band argues that the Topanga Cession is within the Band's Reservation, and Congress never diminished the Band's Reservation. Therefore, under New Dakota law, the State should remit any tax collected from the TPT back to the Band. *Id*. at 4.

In 2018, the District Court of New Dakota ruled against the Band. *Id.* at 9. Regarding the Topanga Cession status, the District Court held that the Topanga Cession was part of the Maumee Nation. *Id.* The court found that the Treaty of Wauseon set aside for the Maumee

Nation land including the Topanga Cession. *Id.* Additionally, the court stated that nothing in the Treaty of Wauseon or the Treaty with the Wendat of 1859 or its legislative history showed evidence that Congress intended to diminish the reservation. *Id.*

Furthermore, the court ruled that New Dakota could levy its TPT on the Band's commercial development within the Topanga Cession. *Id.* The court held that the doctrines of infringement and preemption did not protect the Band from the TPT. *Id.* The court ruled that in favor of the Maumee Nation on all counts. *Id.*

On September 11, 2020, a three-judge panel of the United States Court of Appeals for the Thirteenth Circuit reversed the District Court's decision. *Id.* at 10. Two of the judges reversed the district court and found that the language in the Maumee Allotment act, PL 60-8107 (May 29, 1908), was unambiguous, and that the language in the Treaty with the Wendat of 1859 abrogated the Maumee Nation's claim to the Topanga Cession. *Id.* Furthermore, the judges held that the Wendat Allotment Act, PL 52-8222 (Jan. 14, 1892), did not contain language sufficient to diminish the Wendat Reservation. *Id.* Therefore, the Circuit held that that Topanga Cession is within the Wendat Reservation.

Judge Lahoz-Gonzales dissented over this issue. *Id.* at 11. Judge Lahoz-Gonzales found that both the Maumee Nation and the Band's claims to the Topanga Cession were invalid. *Id.* He asserted that the Topanga Cession was not in Indian Country and that one-half of the TPT collected by New Dakota should be remitted back to the Maumee Nation as written in the law.

Regarding New Dakota's ability to levy the TPT against the Band, all three judges agreed that the preemption doctrine barred the tax. *Id.* The majority decided that the TPT infringed upon the Band's sovereignty. *Id.* Judge Lahoz-Gonzales dissented regarding the

doctrine of infringement. *Id.* The majority found that the area was within the Band's reservation, and these doctrines protected the Band. *Id*. Furthermore, the majority recognized that because the Topanga Cession was part of the Band's reservation, if New Dakota could levy its TPT, the State would remit back to the Band any taxes collected. *Id*.

The Maumee Nation appealed and the Supreme Court granted certiorari on two issues: whether the Treaty with the Wendat abrogated the Treaty of Wauseon and did the allotment acts diminish the Maumee and Wendat reservations, and whether the doctrine of Indian preemption or infringement prevent New Dakota from collecting its TPT against the Band's corporation.

## SUMMARY OF THE ARGUMENT

This Court should uphold the Thirteenth Circuit findings that the Treaty with the Wendat abrogated the Treaty of Wauseon, that the Band's reservation was not diminished by the Wendat Allotment Act, and that New Dakota's TPT infringes upon the Band's sovereignty and is preempted by the federal government and the Band's interest.

When looking at whether Congress abrogated a treaty right, this Court looks to whether Congress expressed a clear and plain intent to abrogate the right. *United States v. Dion*, 476 U.S. 734, 738 (1986). Essentially, Congress must recognize that there is a conflict between its proposed action and a treaty right, Congress must balance the treaty right with the proposed action, and Congress must resolve the conflict by abrogating the treaty right. *See id.* In the present case, Congress did just that in the Treaty with the Wendat of 1859. It recognized that the Maumee Nation was located around the same vicinity as the proposed reservation for the Band, but it noted that the Maumee Nation was shrinking and did not occupy its full reservation. Further, Congress recognized that there were Indian settlers

already living around the river when certain congresspeople proposed requiring the Indian settlers to cede their interests in the land. Because the 1859 treaty is later in time than the earlier treaty with the Maumee Nation, and Congress made a clear and palpable choice to abrogate the treaty, the Maumee Nation's treaty right to the Topanga Cession was abrogated.

Furthermore, the Band's reservation—including the Topanga Cession—was not diminished by the Wendat Allotment Act. Only Congress has the power to diminish or disestablish a reservation, and Congress must do so through clear and express intent to diminish or disestablish. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020). Although there are no magic words that Congress must say in order to diminish a reservation, generally diminishment is done in two ways: through cessation language or through an unconditional promise to pay a sum certain for ceded lands. *Id.* The Wendat Allotment Act does not contain either type of language. Instead, it is entirely bereft of cessation language and although it appears to pay a sum certain, the sum certain is conditional on the amount of surplus land available—and the sum certain is a future cessation and not a present cessation. *See Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016).

Without the requisite intent, the intent and meaning of the Wendat Allotment Act is clear—which ends the analysis under *McGirt*. However, should this Court determine that the statute is ambiguous and requires some analysis of extratextual sources for context, the result is the same. The legislative history does not demonstrate a clear palpable acknowledgement of the diminishment of the reservation, and the demographics of the Topanga Cession have not lost its Indian Character. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984). As such, this Court should affirm the Thirteenth Circuit's determination that the Treaty with the Wendat of

1859 abrogated the Maumee Nation's treaty rights to the Topanga Cession and that the Wendat Allotment Act did not diminish the Band's reservation.

Furthermore, this Court should affirm the Thirteenth Circuit's holding that New Dakota's TPT infringes upon the Band's sovereignty and is preempted by the federal government and the Band's interest. The Band's commercial development being on fee land does not thwart the protections granted by the infringement and preemption doctrines. This Court has extended protection from state taxation when the property was on fee land but within the reservation. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 478 (1976). Because the commercial development is within the Band's Reservation, the fee land has the same protection even though the federal government is not currently holding the land in trust.

Under *Williams v. Lee*, a Tribe has a right to make its laws and be governed by them unless Congress has expressly allowed state jurisdiction over the Tribe. *Williams v. Lee*, 358 U.S. 217, 220 (1959). In *Oklahoma Tax Commission v. Chickasaw Nation*, this Court has found that a state cannot place the legal incidence on a Tribe without clear congressional consent. 515 U.S. 450, 458 (1995). Furthermore, this Court has found that congressional authorization must be "unmistakably clear." *Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). New Dakota's TPT is an infringement of the Band's sovereignty because New Dakota places the legal tax incidence on the Band. Moreover, there is no congressional consent that is "unmistakably clear" that would allow New Dakota's TPT.

Additionally, under the balancing test put forth in *Crow Tribe of Indians*, the federal-tribal interest preempts New Dakota's tax. *Crow Tribe of Indians v. Mont*, 819 F.2d 895, 901. (9th Cir. 1987). The balancing test examines the federal and tribal interests against the state

interest. *Id*. This Court has held that tribal interest is higher and state interest is lower when the revenue comes from work done within the reservation. *Wash. v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 156 (1980). This case centers on a commercial development with several specialty stores emphasizing the Band's culture and history. With its priority on cultural specialty stores, the commercial development's value will derive mainly from on-reservation work. Thus, this commercial development has a high tribal interest and low state interest.

While the state may have some interest in generating revenue, New Dakota did not narrowly tailor its TPT for their interest. Under *Crow Tribe of Indians,* a tax for a legitimate state interest must be tailored to that interest to be valid on a Tribe. *Crow Tribe,* 819 F.2d at 901. Here, New Dakota places the TPT revenue into a general fund for services that benefit the business community. This general allocation of funds fails the test of being narrowly tailored and is preempted even if New Dakota can show a legitimate state interest.

Alternatively, the Band asserts that if New Dakota can levy its TPT then the State should remit the revenue back to the Band. The commercial development is within the Band's Reservation because Congress has not diminished the Band's Reservation. Under the TPT statute, any revenue collected from tribal businesses operating within their Reservation will be remitted back to the Tribe. 4 N.D.C. §212(5). The Topanga Cession is within the Band's Reservation, and New Dakota should remit the TPT back to the Band.

## ARGUMENT

### III. The Treaty With the Wendat Abrogated the Maumee Claim to the Topanga Cession and is Within the Reservation of the Band

This Court should affirm the holding of the Thirteenth Circuit regarding abrogation and diminishment. At issue in this case is a disputed tract of land—the Topanga Cession. The dispute arises as a result of the shifting boundaries of the Wapakoneta River. In 1802, the Treaty of Wauseon created a reservation for the Maumee for land west of the river. In 1859, Congress ratified a new treaty with the Band creating a reservation for the Band for land east of the river. Prior to the 1859 treaty, but subsequent to the Treaty of Wauseon, the Wapakoneta River shifted approximately three miles to the west. As the Thirteenth Circuit noted, the 1859 treaty abrogated the Treaty of Wauseon to the extent of the Topanga Cession. R. at 10. Furthermore, this Court should find that the language of the allotment acts was not sufficient to diminish the Band's Reservation.

#### A. The Treaty with the Wendat Abrogated the Treaty of Wauseon to the Extent of the Disputed Territory

This Court should affirm the Thirteenth Circuit determination that the Treaty with the Wendat abrogated the Treaty of Wauseon to the extent of the Topanga Cession. When dealing with issues of treaty abrogation, this Court has made clear that "the provisions of an act of Congress, passed in the exercise of its constitutional authority , . . if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty with a foreign power." *United States v. Dion*, 476 U.S. 734, 738 (1986) (internal quotations omitted). As this Court noted in *Dion,* this principle has been extended to Indian law jurisprudence by this Court in *Lone Wolf v. Hitchcock,* 187 U.S. 553, 566 (1903). Essentially,

Congress has the authority to abrogate treaties with the tribes so long as Congress expresses clear intent to do so.

Nevertheless, this Court has been reluctant to abrogate Indian treaty rights in a "backhanded way" and this Court does not cast aside fundamental treaty rights without "clear and plain" Congressional intent. *Dion*, 476 U.S. at 738–39. Although this Court has never enunciated a brightline test for clear and plain intent, this Court in *Dion* held that when analyzing abrogation issues, the first step should be to determine whether the Congressional statute contains an express declaration of abrogation. *Id.* at 739; *see also Leavenworth v. United States*, 92 U.S. 733, 741 (1875) (stating "Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect."). In the present case, the Treaty with the Wendat expressly ceded all Wendat territory except for those lands east of the Wapakoneta River. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749 art. I. Importantly, the treaty does not carve out any land east of the river for the Maumee Nation. *Id.* The express and plain language of the treaty is clear, the Band's Reservation includes land east of the Wapakoneta River.

However, even if this Court is not convinced by the treaty language itself, the *Dion* Court also indicated that the requisite clear and plain intent can be formed and noted in the legislative history. *Dion*, 476 U.S. at 739. In analyzing the legislative history, this Court looks to whether Congress weighed its intended action against the treaty right and expressly chose to abrogate the treaty. *Id.* Regarding the reservation boundaries of the Maumee Nation and the Band, the legislative history indicates that Congress considered the reservation of the Maumee Nation before ratifying the Treaty with the Wendat.

While deliberating on ratifying the treaty, the Senate clearly contemplated the treaty boundaries of the Maumee Nation and the Band. Senator Lazarus Powell noted that very few Indians lived along the Wapakoneta River, and he urged the Indian agents to seek cession of the land in its entirety for white settlement. R. at 29. This speech is important because it indicates that the Senate understood that there were already Indians living in the Wapakoneta River area that had legal title or at least interest in the land—before the Band received its interest in the land through the establishment of the reservation.

Yet, even more importantly, Senator Solomon Foot explained to the Senate that the Band was the last group of Indians to accept a reservation treaty while the Maumee Nation were among the first groups to settle over fifty years previously. *Id.* at 29–30. Crucially, Foot then stated that "In the many years since the first treaty was made at Wauseon, the Maumee have been reduced in number and no longer inhabit parts of their territory." *Id.* at 30. The implication is clear; because the Maumee Nation—in the eyes of the Senate—no longer inhabited the entirety of its reservation boundaries under the earlier treaty, the Senate would move the Band into the vacated land thus abrogating the treaty. The fact that the Senate intended the Band to live close to the Maumee Nation in order to "be assimilated by the good example of the prosperous farmer and the forthright rancher" lends further credence to the notion that the Senate was moving the Band into the vacated lands that were nearby Maumee Nation settlements. *Id.*

Ultimately, the Powell and Foot speeches, taken together, indicate that Congress recognized that the Indians living in the Wapakoneta River area had interest in the land at least in part through the Treaty of Wauseon. And, the speeches demonstrate that Congress recognized that ratifying the Treaty with the Wendat would, at least in part, abrogate those

earlier treaty rights. Nevertheless, Congress ratified the 1859 Treaty with the Wendat granting the Band a reservation east of the Wapakoneta River. Congress chose to do so in part because it viewed the Maumee Nation Reservation established at Wauseon of being at least partially vacated. In sum, Congress considered the conflict between its action and the treaty rights and chose to resolve the conflict by abrogating the treaty. Such clear and plain intent seemingly satisfies the requirements set forth by the *Dion* Court. As such, this Court should find that the Treaty of Wauseon was abrogated by the 1859 Treaty with the Wendat. Because the Treaty of Wauseon was abrogated, this Court should find that the Topanga Cession is part of the Band's Reservation unless this Court finds that the Band's Reservation has been diminished or disestablished.

B. The Allotment Acts Do Not Diminish or Disestablish the Band's Reservation and the Topanga Cession Is Still Part of the Band's Reservation

This Court should affirm the Thirteenth Circuit's determination that the Band's reservation was not diminished or disestablished by the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). When analyzing this issue, it is important to note that "only Congress can divest a reservation of its land and diminish its boundaries." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020). Indeed, "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." *Solem v. Barlett*, 465 U.S. 463, 470 (1984). Further, this Court has ruled that reservation disestablishment is not to be lightly inferred. *Id.* at 472. To determine whether Congress diminished the Band's reservation, this Court looks to specific Acts of Congress because "[i]f Congress wishes to break the promise of a reservation, it must say so." *McGirt*, 140 S. Ct. at 2462.

The Maumee Nation points to the Wendat Allotment Act as evidence of diminishment in the Topanga Cession. A close look at the statutory language reveals that the Wendat Allotment Act does not have the requisite clear and express intent required to diminish the reservation. Diminishment and disestablishment language can take many forms and "has never required any particular form of words." *Id.* at 2463. Congress can provide for "an explicit reference to cession or an unconditional commitment to compensate the Indian tribe for its open land." *Id.* at 2462. Congress can unequivocally state that tribal lands are "restored to the public domain." *Hagen v. Utah*, 510 U.S. 399, 412 (1994). Or, Congress can describe the reservation as "discontinued, abolished, or vacated." *McGirt*, 140 S. Ct. at 2463. Any of the foregoing examples would create an "almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem*, 465 U.S. at 470.

The Wendat Allotment Act does none of those things. Instead, the Wendat Allotment Act provides for 160-acre allotments for tribal members and opening the non-allotted lands to white settlers. *See* Wendat Allotment Act, P.L. 52-8222 § 1 (Jan. 14, 1892). Further, the Act expressly states that the eastern half of the reservation will continue to be held in trust by the United States. *Id.* The Maumee Nation may argue that expressly protecting the eastern half is an implicit acknowledgement of diminishment of the western half. This Court has never provided for implied reservation diminishment. To the contrary, in *McGirt*, this Court expressly stated that Congress must "clearly express its intent [to diminish or disestablish a reservation]." 140 S. Ct. at 2463. Silence is not a form of clear expression. The Maumee Nation cannot show that Congress intended to diminish the Band's Reservation.

Section two of the Wendat Allotment Act further supports the position that the Band's Reservation was not diminished. Section two provides that on a future date, land that

is not allotted to the Band will be open to settlers and that the United States will pay the Band for the surplus lands. Wendat Allotment Act, P.L. 52-8222 § 2. The District Court found that this language amounted to a sum-certain cession of land which diminished the Wendat Reservation. R. at 9. Such an interpretation of the statute is inconsistent with this Court's jurisprudence. In *Nebraska v. Parker*, this Court held that diminishment language commonly "evidenc[ed] the present and total surrender of all tribal interests" or "an unconditional commitment from Congress to compensate the Indian tribe for its opened land." 136 S. Ct. 1072, 1079 (2016). The Band did not presently surrender its tribal interests. Instead, the Band only would have surrendered any tribal interest in the future at the point in time when all allotments were made. *See* Wendat Allotment Act, P.L. 52-8222 § 2. Further, because the amount of surplus land available was not certain, this is not a sum-certain cessation of land. Instead, the sum is conditioned upon if surplus land is available and how much land is available. Absent anywhere in the Wendat Allotment Act is any mention of a cession of land. As such the Wendat Allotment Act is unambiguously clear.

This conclusion is further supported when the Wendat Allotment Act is compared to the Treaty with the Wendat of 1859. The treaty language contains express clear language of cessation not present in the allotment bill. *Compare* R. at 18 ("The Chiefs, Headmen and Warriors, aforesaid agree to cede to the United States. . .; "From the cession aforesaid. . .; "In consideration of the cession aforesaid, the United States agree to pay to the Wendat Huron Indians, an annuity for the term of twenty years, of two-hundred thousand dollars . . .") *with* R. at 15 (lack of cession language in the allotment act). Seemingly, this confirms the *McGirt* Court's point that "history shows that Congress knows how to withdraw a reservation when it

can muster the will." 140 S. Ct. at 2462. Congress used cessation language with the Band in 1859, yet chose not to use the same language in the 1892 allotment act.

This Court in *McGirt* came to a similar conclusion regarding the Muscogee Creek Nation located in Oklahoma. This Court noted that "[w]ithout doubt, in 1832 the Creek 'ceded' their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. And in 1866, they 'ceded and conveyed' a portion of that reservation to the United States." *Id.* at 2464. Of particular note, this Court determined that "because their exists no equivalent law terminating what remained, the Creek Reservation survived allotment." *Id.* Much like the present treaty and allotment act, Congress used cessation language in the treaty and failed to do so in the subsequent allotment act. Without the requisite clear language, this Court should affirm the Thirteenth Circuit and determine that the Band's Reservation survived allotment.

It is also worth noting that the roughly contemporaneous Maumee Nation allotment act does contain the plain and clear intent to diminish the Maumee Nation Reservation. *See* R. at 13, § 1 ("The Indians have agreed to consider the entire eastern quarter surplus and to cede their interest in the surplus lands to the United States where it may be returned to the public domain by way of this act."). The Maumee Nation need look no further than its own treaties and statutes for an example of exactly what is required in order to diminish or disestablish a reservation. Such language is not found in the Wendat Allotment Act.

The Maumee Nation may urge this court to consult extratextual sources in support of its argument that the Allotment Acts diminished the Band's claims to the Topanga Cession. Nevertheless, "there is no need to consult extratextual sources when the meaning of a statute's terms is clear." *McGirt,* 140 S. Ct. at 2469. Furthermore, the Maumee Nation should

not be permitted to use such sources to overcome the clear statutory terms or to create ambiguity about the statute's meaning. *See id.* As such, this Court should affirm the Thirteenth Circuit's determination that the Allotment Acts did not diminish the Band's claims to the Topanga Cession and that the Topanga Cession is located on the Band's Reservation.

Nevertheless, should this Court find that the language of the Wendat Allotment Act is ambiguous, this Court can analyze extratextual sources in order to interpret Congress' intent in passing the Act. *Id.* When consulting demographics and legislative history, the result should be the same. Congress did not diminish the Band's Reservation when it passed the Wendat Allotment Act. This Court in *Solem* determined that "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment."465 U.S. at 471. Instead, *Solem* indicates that intent can be inferred through legislative reports or through the demographics of the present-day reservation. *Id.* Essentially, should this stage of statutory interpretation come into play, the Maumee Nation must be able to show that there was a "widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation" or that the present-day reservation has lost its "Indian character." *Id.* This the Maumee Nation cannot do.

Importantly, in the years following this Court's opinion in *Solem,* this Court has limited the use of extratextual sources in determining Congress' intent regarding a reservation. For example, in *McGirt*, this Court explained that the expansive language of *Solem* was intended to be interpreted in accordance with this Court's decision in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). *McGirt*, 140 S. Ct. at 2469. This Court noted that in *Rosebud* the Tribe attempted to use subsequent historical events to create ambiguity

regarding clear statutory language and that the *Rosebud* Court rejected such an attempt because such "evidence could not overcome congressional intent as expressed in a statute." *Id.* Furthermore, in *Parker,* this Court explained that "evidence of the subsequent treatment of the disputed land . . . has limited interpretative value." 136 S. Ct. at 1072. Clearly, while the extratextual sources may provide help in interpreting an ambiguous statute, the extratextual sources alone are seemingly insufficient to support a finding of Congress' intent.

Regarding the legislative history of the Wendat Allotment Act, the Maumee Nation will likely point to language from the Secretary of the Interior about opening Wendat land to the public domain as evidence of an intent to diminish the reservation.[3] *See* R. at 20. This language is less persuasive than at first glance. This is primarily because the congresspeople on record describe a clear understanding that Congress will maintain its trust relationship with the Wendat even after the allotment. *See* R. at 20 ("the General Government ought not at once to put upon the State or Territory the burden of caring for the Indian"). And, the record indicates that Congress understood that at the time of the passage of the act, the Band was not prepared to wholly assimilate and become "civilized" implying a continued relationship between the government and the Band. *See* R. at 21 ("The Wendat are the most distinctly warrior Indians left on the continent today; that they keep themselves further away from white people, and have less to do with them than any others. . . and when it comes to allotment, you cannot bring the same influences to bear upon them that you can bring to bear upon other Indians[.]"). Finally, it is clear that Congress' intent was to open as much land as possible to white settlement. *Id.* at 20–21. Yet, in drafting and passing the act, Congress

[3] "In the 19th Century, to restore land to the public domain was to extinguish the land's prior use—its use, for example, as an Indian reservation—and to return it to the United States either to be sold or set aside for other public purposes." *Nebraska v. Parker,* 136 S. Ct. 1072, 1079 (2016).

expressly chose not to use cessation language. Ultimately, any argument that the legislative history is sufficient to demonstrate clear intent to diminish the Band's Reservation is unavailing because the record is not clear enough to overcome the clear language of the statute. *See Parker*, 136 S. Ct. at 1080 ("The mixed historical evidence relied upon by the parties cannot overcome the lack of clear textual signal that Congress intended to diminish the reservation.").

Subsequent demographics and history of the Topanga Cession area should likewise lead to a conclusion that the Band's Reservation was not diminished. In *Parker,* this Court found that a reservation was not diminished even though the tribe had been "almost entirely absent" from the disputed territory for over 120 years, enforced zero regulations in the disputed territory, and did not maintain any office or provide social services in the disputed area. *Id.* at 1082. The Court came to this conclusion even though the disputed territory was less than 2% Indian. *Id.* at 1078. If such facts were insufficient to overcome the lack of textual support for diminishment, then the demographics of the Topanga Cession should seemingly likewise be insufficient to form the basis for diminishment of the Band's Reservation.

In the present case, the Band seeks to build a cultural center as well as provide social services including housing and nursing care for needy and elderly tribal members in the Topanga Cession. The Band has asserted ownership over the Cession for more than eighty years.[4] And, census data in 2010 indicated that the Cession is 17.9% Indian—nearly nine times the percentage of the disputed territory in *Parker.* If the disputed territory in *Parker*

[4] In order to foster goodwill with the Maumee Nation, the Band has not attempted to utilize the courts to settle its dispute until the Maumee Nation filed suit against it.

had not lost its Indian character, then this Court should accordingly find that the Topanga Cession has not lost its Indian character.

Ultimately, this Court should affirm the Thirteenth Circuit Court of Appeals' determination that the Treaty with the Wendat of 1859 abrogated the Treaty of Wauseon because Congress considered the conflict between its intended course of action and the Maunee Nation's treaty rights and determined to resolve the conflict through abrogation. In addition, this Court should also affirm the Thirteenth Circuit's determination that the Wendat Allotment Act did not diminish the Band's Reservation because Congress did not make it expressly clear that it intended to diminish the reservation.

## IV. The Band's Commercial Development Land is Fee Land Within Their Reservation and Is Protected from New Dakota's Law Requiring a Transaction Privilege Tax License

This Court should uphold the Thirteenth Circuit's holding that the doctrines of infringement and preemption bar New Dakota's TPT. Like the question of diminishment, congressional authority is at the heart of New Dakota's ability to tax the Band. The United States Constitution vests broad power to regulate tribes with Congress. Article One of the Constitution asserts that the ability to govern tribes belongs to Congress, "to regulate commerce with . . . Indian Tribes." U.S. Const. art. 1, § 8, cl 3. Courts have long held that Congress has the authority to control tribes and not state governments. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

In early American jurisprudence, the rules regarding state regulation over tribes were strict. In *Worcester v. Georgia,* this Court held that Georgia's laws could not control the Cherokee Nation inside its territory. *Worcester v. Georgia*, 31 U.S. 515 (1832). Presently, there is a less strict approach, and questions revolving around state law and tribes are more

fact-specific. In a previous case, this Court maintained that "[a]s a result, there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *White Mountain Apache Tribe*, 448 U.S. at 142.

Two legal doctrines protect the tribes from regulation by states. *Id*. First, as a sovereign nation, the Band has the right to make their laws and be bound by them. *Id.* Consequently, the infringement doctrine prohibits New Dakota from making laws over the Band if it infringes upon their sovereignty. Second, federal and tribal laws, interests, and policies may preempt New Dakota's TPT. *Id*. Importantly, these doctrines are independent of each other. *Id*. at 143. Therefore, the Maumee Nation must overcome both protections separately to impose their TPT against the Band. In this case, both the doctrines of infringement and preemption protect the Band from New Dakota's TPT.

The land at the center of the lawsuit is owned in fee by the Band, and currently, the federal government is not holding it in trust. R. at 11. While the federal government has not taken it into trust, the doctrines of infringement and preemption still protect the Band from New Dakota's TPT. The Band's fee land is still within the definition of Indian Country.

Congress promulgated the definition of Indian Country in 18 U.S.C. §1153. Congress explicitly included fee land that is within the reservation stating, "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." 18 U.S.C. §1153(a). Furthermore, this Court has regularly extended protection from state regulation when the land in question is fee land within a reservation. In *Oklahoma Tax Commission v. Sac & Fox Nation*, this Court held that Oklahoma could not tax members of the Sac and Fox Nation who lived within Indian Country but not on a formal reservation. 508 U.S. 114, 126 (1993). Additionally, this Court refused to extend Section six of the General Allotment act to Indian-

owned fee land within the reservation in *Moe*.[5] *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 478 (1976).

The one distinguishing case concerning fee land is *City of Sherrill v. Oneida Indian Nation*. 544 U.S. 197. In *City of Sherrill*, the Oneida Indian Nation had purchased land in their ancestral home in New York, which New York had controlled since the early 19th century. *Id*. at 202. The Oneidas asserted claims of tribal sovereignty over the newly obtained fee land to prevent the tribe from having to pay property tax. *Id*. Before the Oneida Nation repurchased the land, the non-Native landowners paid the local and state taxes. *Id*. at 214.

This Court held that the Oneida Nation could not restore their sovereignty over the area and was responsible for the property taxes. *Id.* at 202-03. This Court reasoned that the Oneida Nation waited too long to restore its sovereign control to thwart New York's property tax. *Id*. at 216. Furthermore, this Court cited the exceedingly high non-Indian population in the area[6] and the potential to disturb local communities and laws by a parcel-by-parcel restoration of tribal authority. *Id*. at 219-20. Therefore, this Court found that the Oneida Nation could not reestablish its tribal control to block New York's property taxes. *Id*. 221.

The present case is analogous to the *Sac & Fox* and *Moe* cases and distinguishable from the *City of Sherrill* case. First, the *City of Sherrill* case was fee land not within an established reservation under the control of the Tribe. However, the Band's land is within their established reservation. R. at 11. This fact is analogous to the tribes in the *Sac & Fox,* and *Moe* cases where the state placed the taxes on fee land within Indian Country. Second, in

[5] Congress provided in Section six of the General Allotment Act that "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 24 Stat. 388, 49 Cong. Ch. 119.
[6] The Court noted that members of the Onieda Nation only composed 1 percent of the city of Sherrill's population. *City of Sherrill*, 544 U.S. at 211.

*City of Sherrill*, the Tribe had waited almost two centuries to restore its authority over the area. There is no prolonged disruption in the Band's authority in the Topanga Cession. The Band has remained within their Reservation since the signing of the Treaty with the Wendat. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749.

An additional distinguishing fact from the *City of Sherrill* case is the Native population. In the *City of Sherrill* case, the census data showed that the Native populace in the City of Sherrill was one percent. In the present case, the Topanga Cession has a Native population of almost eighteen percent. R. at 7. Finally, the Band is not restoring its authority parcel-by-parcel like the Oneida Nation. Instead, the Band already has an established presence and tribal authority in New Dakota. *Id* at 8. Therefore, this Court should find that the Band's fee land in the Topanga Cession is a protected part of the Wendat reservation, and the doctrines of infringement and preemption apply.

### A. New Dakota's Transaction Privilege Tax Infringes Upon the Band's Sovereignty Because the Legal Incidence Is on the Tribe, and Congress Has Not Consented to the Tax.

New Dakota's TPT places the legal incidence of the tax on the Band, and that action infringes upon the Band's sovereignty. The earliest cases between tribes and states recognized the unique relationship between the federal government, tribes, and states. When examining the relationship between the Cherokee Nation and the State of Georgia, Chief Justice John Marshall asserted the basic ideas of infringement, declaring, "The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." *Worcester*, 31 U.S. at 536. While the relationship between states and tribes has evolved and changed, the doctrine of

infringement still protects the tribes from states by asserting "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 221 (1959).

*Williams* represents the modern infringement doctrine. In *Williams*, a non-member merchant sued in Arizona state court to collect goods sold to a husband and wife who were members of the Navajo Nation and residents of the Navajo Reservation. *Id*. at 217-18. The case centered on the issue of Arizona having jurisdiction over the Native American couple. *Id.* at 218. This Court held that absent an act of Congress, Arizona did not have jurisdiction. *Id.* at 220. The *Williams* holding stands for the proposition that state action cannot infringe upon the rights of the tribes to makes their laws and be ruled by them on their land. *Id*.

Within taxation, there are two issues concerning infringement. First, a state cannot place the legal incidence of a tax on a tribe within their reservation. In this case, the legal incidence of the tax is squarely on the Band. Second, if the legal incidence is on the tribe, Congress must expressly consent to the tax. Here, there is no express congressional consent for New Dakota to tax the Band. Therefore, New Dakota cannot place a state tax on the Band without congressional consent.

When analyzing questions of state taxes over tribes, this Court has held that the initial inquiry should revolve around who bears the legal incidence of a tax. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). This Court held that "When a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country . . .'Absent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians." *Id.* at 458 (*quoting County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992)).

Furthermore, this Court has held that the tax incidence makes a tax unenforceable with various taxes. This Court found that a Native American's personal property inside of Indian county was not subject to state property taxes. *Bryan v. Itasca County,* 426 U.S. 373, 391-92 (1976). Moreover, Arizona could not impose its income tax on a tribal member whose income was generated from inside the reservation while living within the reservation. *McClanahan v. Ariz. State Tax Comm'n*., 411 U.S. 164, 181 (1973). Likewise, Oklahoma could not apply its motor fuel tax and income tax on members who work and reside within the reservation. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 455.

When examining who bears the tax incidence, there are several issues that the court may consider. First, does the state's legislation expressly identify the party who assumes the legal incidence. *Id.* at 461. The New Dakota law only states who remits the taxes back to New Dakota and not who assumes the tax incidence. 4 N.D.C. §212(2). In the *Chickasaw Nation* case, the use of "remit" in the Oklahoma legislation was insufficient to identify who bears the legal incidence expressly. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 461. Therefore, New Dakota's statute does not expressly place the legal incidence on a party.

Second, a court may examine the statute to identify a provision that directly passes the incidence to the customer. *Id.* at 461. In *Moe*, the Montana statute stated that "[the cigarette tax] shall be conclusively presumed to be direct on the retail consumer precollected for the purpose of convenience and facility only." *Moe*, 425 U.S. at 482. This Court held that the Montana statute's language was enough to place the legal incidence on the customer and not the tribe. *Id*. at 483. In this case, there is no language in the New Dakota statute similar to the Montana statute. Therefore, New Dakota cannot assert that the tax is really on the consumers and not on the Band.

When a statute lacks these direct identifications, this Court has looked at a "fair interpretation of the taxing statute as written and applied." *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985). Applying the fair interpretation test to New Dakota's TPT, the tax incidence falls on the Band. The Band is the entity that must apply and pay for the TPT license to New Dakota. 4 N.D.C. §212(1). Moreover, the Band could not engage in business without the TPT license. *Id.* Because the Wendat's commercial development would have more than one physical store, New Dakota would require the Band to report which tax comes from which store. *Id.* This requirement would put more work on the Band to comply with the law.

Furthermore, the Band would be required to remit three percent of their gross-sales to New Dakota. *Id*. While not indicative of expressed language, this Court has held that the word "remit" can show a logical relationship to whom the legal incidence belongs. *Chickasaw Nation*, 515 U.S. at 461. New Dakota's TPT requires the licensee to remit the tax. Therefore, New Dakota places the legal incidence on the Band. Unless Congress has consented to the tax, New Dakota cannot put the legal incidence on the Band.

New Dakota must have congressional consent to place the legal incidence on the Band. This Court has held that Congress' intent to allow a state to tax a Tribe must be "unmistakably clear." *Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). The *Blackfeet* Court found that language in the 1924 Act was unmistakably clear when the statute stated: "That the production of oil and gas and other minerals on such lands *may be taxed by the State* in which said lands are located in all respects the same as production on unrestricted lands." *Id*. at 762 (emphasis added). In the present case, there is no explicit language that resembles the language used in the *Blackfeet* case.

Furthermore, this Court has held that Congress has explicitly allowed a state to tax a tribe when it has disestablished the reservation. In *Osage Nation v. Irby*, the Osage Nation asserted their tribal sovereignty over their Reservation and argued that members working and living within were exempt from Oklahoma's taxes. 597 F.3d 1117, 1121 (10th Cir. 2010). However, the Tenth Circuit found that Congress disestablished the Osage Nation's Reservation. *Id*. at 1120. Because of this finding, the Tenth Circuit did not examine the tax issue, only noting that Oklahoma had jurisdiction over Osage members. *Id*. at 1127.

While the Maumee Nation asserts that Congress has diminished the Band's Reservation, as detailed above, Congress has not. Therefore, Congress has not allowed New Dakota to tax the Band by diminishing their reservation. Overall, this Court should bar New Dakota from levying its TPT against the Band because it places the legal incidence on the Band without direct congressional approval. The TPT infringes upon the Band's tribal sovereignty and the right to be governed by their laws.

### B. New Dakota's Transaction Privilege Tax is Preempted Because the Band Generates its Revenue from On-Reservation Work and the General Federal Policy of Tribal Self-Sufficiency

This Court should uphold the Thirteenth Circuit holding that the preemption doctrine bars New Dakota's TPT. The Thirteenth Circuit found that federal-tribal interests preempted the TPT. The preemption analysis is a balancing test based upon three different interests: the federal government, the Tribe, and the state. *Crow Tribe of Indians v. Mont*, 819 F.2d 895, 901. (9th Cir. 1987). This Court maintains a clear view of preemption in favor of Tribes, asserting, "Any finding of interference, then, would be enough to subject the state taxes to preemption." *Id*. at 900. Furthermore, New Dakota must show that it narrowly tailored the TPT to achieve those interests. *Id*. at 901.

One of the main interests of the Band is to raise revenue. This Court holds that the tribe's interest in raising revenue is strongest when on-reservation work generates the value. *Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980). In *Colville*, this Court found that the federal-tribal interest did not trump Washington's interest. *Id.* 160-161. *Colville* centered on Washington's cigarette stamp tax and three tribes[7] selling unstamped cigarettes to non-members. *Id.* at 138. The Tribes only sold the cigarettes, which were made elsewhere and delivered to the reservation. *Id*. at 139. This arrangement allowed the Tribes to avoid Washington's cigarette tax and made the Tribes' cigarettes notably cheaper than off-reservation retailers. *Id*. at 145.

This Court held that the federal-tribal relationship did not preempt Washington's tax. *Id*. 160-61. This Court reasoned that the tribes were marketing their tax exemption to non-members who would otherwise purchase their cigarettes at off-reservation retailers. *Id*. at 157. Furthermore, this Court asserted that Washington had an interest in raising its revenue and that interest was strongest when the value generated by the tribes was from off-reservation work. *Id*. This Court found that Washington's interest trumps the interest of the Tribes because the value of the cigarettes came from off-reservation work. *Id.* at 159.

The current case is distinguishable from the sales tax in *Colville*. In *Colville*, this Court asserted that the Tribes interest did not preempt Washington's taxes because the value was not derived from on-reservation activities. *Id*. at 156-57. However, New Dakota's TPT taxes on-reservation activities where on-reservation work would generate considerable revenue. The Band's commercial building will consist of a café serving traditional Wendat

[7] The three tribes were the Colville, Makah, and Lummi Indian Tribe.

cuisine, a grocery store with fresh and traditional food, a salon/spa, a bookstore, a pharmacy, a nursing home, a cultural center, and a museum. R. at 48. Most of these businesses would generate their revenue from on-reservation work.

The Band's case is further distinguished from *Colville* because of the uniqueness of the services offered. In *Colville*, this Court asserted that the cigarette purchasers would purchase their cigarettes elsewhere if not for the tribes tax exemption savings. *Id*. at 157. However, here, the products' uniqueness prevents someone from easily purchasing the product off of the Band's Reservation. Most of the business going into the Band's commercial project focus on traditional items and products. Therefore, a non-member would need to go to the reservation to receive these products. Thus, the present case is distinguishable from *Colville* because the Band is not marketing its tax exemption.

This Court found that federal-tribal interest trumped state interest in the *Bracker* case. In that case, the White Mountain Apache Tribe operated a timber industry solely on its reservation. *White Mountain Apache Tribe*, 448 U.S. at 138. The Tribe created the Fort Apache Timber Co. (FATCO) to oversee the timber business. *Id.* at 139. To facilitate its timber industry, FATCO used a non-member company, Pinetop, to cut, fell, and transport the trees. *Id*. 139. Arizona wanted to impose taxes against Pinetop with a motor carrier license tax and excise or use fuel tax. *Id*. at 139-40. This Court held that a federal-tribal scheme preempted Arizona's taxes. *Id*. 152.

The *Bracker* Court reasoned that the federal government had broad control over all aspects of timber sales and regulations. *Id*. at 145. The Bureau of Indian Affairs (BIA) and the Secretary of the Interior promulgated the regulations that guided the White Mountain Apache Tribe's timber industry. *Id.* at 146. Furthermore, the regulations' goal was to develop

the forest to benefit the Tribe. *Id.* at 147. The Court reasoned that the BIA practiced daily supervision over the management of the land. *Id*. The *Bracker* Court held that the regulatory scheme was so pervasive that it barred additional state taxes. *Id*. at 148.

Furthermore, the *Bracker* Court asserted a robust federal policy of allowing Native Americans to become self-sufficient. Addressing this policy, this Court stated, "That objective is part of the general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their' business and economic affairs.'" *Id*. at 149 (citing *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151 (1973)). Other federal policies echoed this sentiment. When Congress passed the Indian Reorganization Act (IRA), the House Report stated its purpose as "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." (*See also, California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 219, (1987)) ("Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests").

This Court should uphold the Appeals Court's holding that the taxes are preemptive because the strong federal-tribal interest that underlined the *Bracker* case is present in this case. Like *Bracker,* there is comprehensive oversight by another sovereign power other than the state. While in *Bracker*, it was the federal government, here it is the Band itself. The Wendat Commercial Development Corporation ("WCDC") oversees the Band's commercial development. The WCDC was created by the Secretary of the Interior under section 17 of the IRA. 73 P.L. 383.

The federal government created the WCDC and gave it broad power. Section 17 of the IRA states that the charter company has the power to "purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal . . . and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law." 73 P.L. 383. These powers given to the WCDC preempt New Dakota's ability to regulate the Band through taxation.

Additionally, commercial development furthers the broad policy of self-sufficiency outlined in *Bracker*. The commercial development will provide employment opportunities for the Band. R. at 7. Additionally, the cultural center and museum will help the Band to record and teach its history. The revenue raised from the project will help sustain the Band and its future generations. Finally, the nursing home will provide care for the Band's older adults, thus protecting a vulnerable group. Therefore, this Court should find that the federal-tribal interest, in this case, trumps New Dakota's interest.

While New Dakota may have legitimate interests in the Tribe paying taxes to support programs used by its residences, courts have held that the state must narrowly construct the tax to support those goals. In the *Crow Tribe* case, the Ninth Circuit held that Montana had a legitimate interest in protecting its environment from pollution caused by coal mining. *Crow Tribe*, 819 F.2d at 901. However, Montana did not solely dedicate the taxes to that interest. *Id*. Instead, the taxes mostly went into a permanent trust account and Montana's general fund. *Id*. In *Sac & Fox Nation*, this Court found that Oklahoma did not narrowly tailor its motor vehicle tax to the amount used outside of Indian Country. 508 U.S. at 128. Therefore, this Court held that Oklahoma could not levy its motor vehicle tax. *Id*. (*See also, Washington*, 447 U.S. at 163-64) ("Had Washington tailored its tax to the amount of actual

off-reservation use. . . this might be a different case. But it has not done so, and we decline to treat the case as if it had.").

In this case, New Dakota's TPT goes into the general revenue fund. 4 N.D.C. §212(3). While several services like funding the courts, maintaining roads, and other infrastructure would benefit the Band, the TPT does not provide how the taxes are proportioned out. *Id*. This general allocation is analogous to the *Crow Tribe* case, where the taxes went into a trust account and the general fund. However, the tax must be narrowly tailored and proportional to the legitimate state interest. Furthermore, the TPT does not differentiate between the taxes for on-reservation usage and off-reservation usage. Therefore, the tax has the same problem as the motor vehicle tax in *Sac & Fox*. Here, the TPT require the Band to pay more than merely the off-reservation services it uses. Therefore, the TPT is overly general and not narrowly tailored to support any legitimate interest of New Dakota.

If this Court does not find that the doctrines of infringement and preemption apply, then New Dakota should remit the tax back to the Band because the Topanga Cession is part of the Band's Reservation. As discussed above, Congress has not diminished the Band's Reservation. Because Congress has not diminished the Band's Reservation, the Topanga Cession remains part of their Reservation. Under New Dakota's TPT law, New Dakota will remit any tax collected on a tribe's reservation. 4 N.D.C. §212 (5). Therefore, even if the doctrines of infringement and preemption does not protect the Band, the Band should be remitted all the taxes it would pay to New Dakota under its law.

## CONCLUSION

The Treaty with the Wendat of 1859 abrogated the earlier treaty between the United States and the Maumee Nation to the extent of the the Topanga Cession. Congress

recognized the conflict, balanced the treaty right, and determined to resolve the conflict through abrogation. The Maumee Nation does not have a territorial interest in the Topanga Cession. In addition, the Topanga Cession remains within the Band's Reservation because the Reservation was not diminished by the Wendat Allotment Act. The Allotment Act contains zero cessation language. Likewise, the Act does not contain an unconditional promise to pay a sum certain in exchange for a present cessation of an interest in land. The extratextual sources likewise support a finding that the Reservation was not diminished.

Furthermore, New Dakota cannot levy its TPT against the Band because of the doctrines of infringement and preemption. These doctrines protect the Band from the tax. The TPT would infringe upon the Band's sovereignty by placing the legal tax incidence on the tribe without congressional consent. Tribal interest and federal policy preempt the tax. The tribe has a high interest when the revenue generated is from on-reservation work. The uniqueness of the services offered indicates that a substantial part of the revenues would come from on-reservation work. And, the federal government has an interest in policies that help tribes become self-sufficient. Finally, the TPT is overly broad and not narrowly tailored

For the foregoing reasons, the Wendat Band of Huron Indians respectfully requests that this Court affirm the Thirteenth Circuit's determination that the Treaty with the Wendat of 1859 abrogated the Maumee Nation's interest in the Topanga Cession, that the Topanga Cession remains in the Band's Reservation because the Reservation was not diminished, and that New Dakota cannot levy its TPT against the Band because of the doctrines of infringement and preemption.

Respectfully submitted,

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